United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

BOOTH AMERICAN COMPANY,

348

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal From a Decision of the
Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

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Appellant,

v.

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Appellee.

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JOINT APPENDIX

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JOINT APPENDIX

[Received September 13, 1966]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BOOTH AMERICAN COMPANY Appellant	)	
v.	)	Case No. 20,367
FEDERAL COMMUNICATIONS COMMISSION Appellee	)	

PREHEARING STIPULATION

The undersigned parties hereto, by their counsel, held an informal prehearing conference at the offices of the General Counsel of the Federal Communications Commission on September 12, 1966, at which time the following stipulations were reached:

A. All parties agree and stipulate that the following issues are presented by the appeal:

1. Whether Section 74.1107 of the Commission's Rules (Top 100 Market Rule) was legally adopted in accordance with notice requirements of Section 4 of the Administrative Procedure Act.

2. (a) Whether the Commission in its February 15, 1966 Public Notice informed the Appellant that its proposed CATV operation would not require prior FCC approval because its system was located within the Grade A contour of only one television station.

(b) If so and if Appellant commenced operation in reliance on the Notice before the Commission changed the provisions of the Notice --

(1) Can the Commission lawfully apply its rules as finally adopted to Appellant's operation.

(2) Can the Commission order Appellant to cease and desist its current operations before considering Appellant's requests for the following:

(i) Its request for temporary operating authority;

(ii) Its request for permanent operating authority;

(iii) Its request for expedited consideration of its request for appropriate authority.

3. Whether the Commission erred in excluding evidence in support of Appellant's request that no cease and desist order should be issued pending disposition of Appellant's above requests.

4. Whether the Commission erred in depriving Appellant of the Hearing Examiner's initial decision or a tentative decision of the Commission en banc, prior to the issuance of a final decision.[1/]

B. The counsel for appellant and appellee stipulate and agree that the Joint Appendix will be filed within 10 days after the time for filing of a reply brief.

C. Reference to the record appearing in the briefs of the parties will be to the page numbers of the record as certified to the Court. In the printing of the Joint Appendix there will be set forth, in addition to the

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1/ Appellant takes the following position: it raised in its Notice of Appeal the question of the asserted jurisdiction of the Commission to regulate CATV systems that do not utilize microwave radio but who receive their signals solely off the air. It raised this question, however, solely to protect its rights, if in separate judicial proceedings it is held that the Commission was without power to issue the CATV rules. The question of the Commission's jurisdiction is now pending in a number of cases to be heard in the Eighth Circuit Court of Appeals. The Court of Appeals for the District of Columbia Circuit has remanded cases before it raising this question to the Eighth Circuit. Appellant, therefore, does not intend to brief this jurisdictional question before the Court unless the jurisdictional questions are not settled in these other cases. In that event, the Appellant will request an opportunity to brief and argue the question of the Commission's jurisdiction, particularly if this Court is not otherwise able to reach a decision favorable to the Appellant on the matters briefed.

Appellee takes the position that the issue of jurisdiction has been abandoned by Appellant.

consecutive numbering of the Joint Appendix, the original record page numbers in bold type and indented in a manner which will render it convenient for the Court to locate the pages referred to in the brief.

Respectfully submitted

/s/ Paul Dobin
Cohn and Marks
* * *
Counsel for Appellant

/s/ Daniel Ohlbaum
Federal Communications Commission
* * *
Counsel for Appellee

September 13, 1966

[Filed September 22, 1966]

PREHEARING ORDER

Before: Fahy, Circuit Judge, in Chambers.

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

[Received August 2, 1966]

NOTICE OF APPEAL AND STATEMENT OF REASONS THEREFOR

Comes now Booth American Company (hereinafter referred to as "Appellant"), pursuant to Section 402(b)(7) of the Communications Act of 1934, as amended, (47 U.S.C. Section 402(b)(7)) and Rule 37 of this Court and states that it is aggrieved by a Decision released by the Federal Communications Commission (hereinafter referred to as "Commission") on July 18, 1966. This decision directed that the Appellant cease and desist from supplying to its subscribers in North Muskegon and Muskegon, Michigan with signals of certain specified television stations which are currently being carried on Appellant's CATV system.

WHEREFORE, Appellant gives notice of its appeal from this Decision to the United States Court of Appeals for the District of Columbia Circuit.

I. Nature of Proceedings

1. Appellant is the owner and operator of a CATV system in the Greater Michigan Area.[1/]

2. Appellee is the Federal Communications Commission, an administrative agency created by the Communications Act of 1934, as amended, and charged with the execution and enforcement of that Act.

3. This proceeding involves a hearing upon an Order to Show Cause released by the Commission on May 13, 1966 and the Decision released by the Commission on July 18, 1966 directing the Appellant to cease and desist from importing distant signals (i.e., signals of stations providing less than a Grade B signal to the area) in Muskegon

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1/ A CATV system is an enterprise which receives television signals transmitted by broadcast stations (either directly off the air or by means of a radio microwave relay), amplifies these signals and distributes them through a system of cables to subscribers who pay a charge for this service. Subscribers are willing to pay for this service so that they may receive a greater variety of television signals and improve the quality of signals available to them through the conventional household antenna.

and North Muskegon, Michigan, the only areas in which the CATV system is now in operation. These distant signals include a non-commercial educational station in Milwaukee, three other Milwaukee stations and one Chicago station.

4. Initial planning for the CATV system for the Greater Muskegon Area took place in mid-1964.[2/] In the latter part of 1964 and in the first part of 1965, Appellant filed applications with the local authorities in the Greater Muskegon Area requesting that each pass an ordinance providing for the licensing and operation of a CATV system within its boundaries.

5. Between August 1965 and December 1965, each of the communities issues an ordinance authorizing the establishment of CATV operations in its community. Appellant immediately filed applications requesting authority to construct and operate a CATV system pursuant to those ordinances.

6. Licenses and franchises for the Appellant's CATV system were issued on the following dates:

North Muskegon	Franchise 25 years	August 23, 1965
Muskegon	License (indefinite)	September 7, 1965
Muskegon Township	License (indefinite)	November 17, 1965
Muskegon Heights	License (indefinite)	December 20, 1965
Norton Township	License (indefinite)	November 23, 1965
Roosevelt Park	License (indefinite)	February 25, 1966

7. Commencing in August, 1965 and continuing through November, 1965, Appellant contracted with General Telephone Company of Michigan for construction of the CATV system in the Greater Muskegon Area. Prior to February 15, 1966, Booth had committed itself to the telephone company to the sum of $1,547,520.00. In addition, Booth had expended $91,549.65 and had committed itself to the expenditure of an additional $127,050.00 in connection with the construction of the Greater Muskegon

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2/ The Greater Muskegon Area is composed of North Muskegon, Muskegon, Muskegon Township, Muskegon Heights, Norton Township, Roosevelt Park, and Laketon Township. According to the 1960 U.S. Census, the total population of these communities in the Greater Muskegon Area is 111,937.

Area CATV system prior to February 15, 1966. By this time Booth had also committed itself to provide CATV service, including the importation of distant signals, to its subscribers. A large number of applications for service from people residing throughout the Greater Muskegon Area, in fact, were received and accepted by the Appellant prior to February 15, 1966.

8. On February 15, 1966, the Commission issued a Public Notice (Mimeo No. 79927) entitled FCC Announces Plan for Regulation of All CATV systems. In that Public Notice, the Commission stated that it had adopted new rules to govern CATV operation which would be subsequently incorporated in a Report and Order, and in this connection it asserted, for the first time, that it had jurisdiction over all CATV systems to the extent necessary to carry out the regulatory program embodied in those rules. With respect to the carriage of "distant signals", the Commission's Public Notice stated that persons who obtained franchises to operate CATV systems in the 100 highest ranked television markets who proposed to extend the signals of television beyond their Grade B contours would be required to obtain FCC approval before CATV service to subscribers could be commenced. This aspect of the Commission's decision was made effective "immediately" and was stated to be applicable to all CATV operation commenced after February 15, 1966. In this connection, the Commission stated further that an evidentiary hearing would be required as to all requests for such FCC approval, unless waiver of the requirement were granted, and that:

> The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market. (Underscoring added).

The Public Notice further stated that the Commission's prior approval after an evidentiary hearing would not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings.

9. Appellant's CATV system was not located within the Grade A service contour of all existing television stations in the Grand Rapids - Kalamazoo television market, which is ranked by the American Research Bureau as the 38th largest television market in the country. Stations WKZO-TV (Channel 3) Kalamazoo, Michigan, and WOOD-TV, (Channel 8) Grand Rapids, each place a predicted Grade B coverage contour over the Greater Muskegon Area but not a Grade A contour. The CATV system is located within the Grade A contour of only one television station, WZZM-TV, located in Grand Rapids, Michigan. Thus, the Public Notice apparently placed no bar upon the establishment of the CATV system in the Greater Muskegon Area. On the basis of the February 15, 1966 Public Notice, no permission was then required or would be required from the Commission before Appellant proceeded to institute CATV service. In light of the prior commitments which had been made by Appellant, it proceeded in the normal course of business with all steps required for the institution of CATV service in the Greater Muskegon Area without taking any unusual steps to accelerate the institution of service.

10. Appellant, consistent with the standards then in effect, completed connections of the cable to the subscribers' television sets and commenced operation, including the provision of distant signals, to the subscribers of its Greater Muskegon Area CATV system on March 4, 1966. Appellant also accepted more service applications from persons residing throughout the Greater Muskegon Area and expended more money in connection with the operation of its CATV system. Subsequent to February 15, 1966, Appellant expended $31,518.39 in addition to amounts previously expended for CATV operational expenses.

11. On March 8, 1966, the Commission released its Second Report and Order in Docket Nos. 14895 et al. which set forth the new rules for the regulation of CATV systems. This report, however, contained an unexplained and unexpected change in the top 100-market rule. The Second Report and Order was published in the Federal Register on March 17, 1966 (31 Fed. Reg. 4540). The Rule (Section 74.1107) as finally adopted

in the Second Report and Order stated that if only one of the television stations assigned to the major market put a predicted Grade A contour over the community where the CATV system is located, then the Commission's major market policy would apply. This Rule was made applicable retroactive to February 15, 1966, the date that the Commission issued its Public Notice. Thus, while the Greater Muskegon Area CATV system was operating in complete conformity with the Commission's major market rule announced on February 15, 1966 in the Public Notice, it was now, if the Rule was valid as to it and not waived, subject to the prohibitions of Section 74.1107 of the Commission's Rules as stated in the Second Report and Order, because it located within an area falling within the Grade A contour of only one television station located in the combined Grand Rapids - Kalamazoo television market.

12. When the Commission, by telegram of April 20, 1966, first raised the question of possible impropriety in the operation of the Muskegon CATV system, Booth promptly stated in its reply of April 28, 1966 that if it was determined that the rules were valid as applied to its system, it would file an appropriate request for waiver and it stated further its intention "to comply with whatever decision may be properly reached at the conclusion of the proceedings on such a waiver." At the same time, Appellant sought authority to continue operating on a temporary basis until such determination could be made by the Commission.

13. On May 13, 1966, the Commission released an Order to Show Cause in which it stated that, on the basis of the information before it, Appellant was operating a CATV system in North Muskegon and Muskegon in violation of Section 74.1107 of the Commission's Rules as adopted in the Second Report and Order. The Commission, pursuant to Sections 312(b)(c) and 409(c) of the Communications Act of 1934, as amended, directed Appellant to show cause why it should not be ordered to cease and desist from further operations in North Muskegon and Muskegon which extends the signals of television stations beyond the Grade B contour in violation of Section 74.1107 of the Commission's Rules.

14. Booth's request for permission to continue to operate temporarily was denied by the Commission in the Order to Show Cause on the procedural ground that the arguments in support of the request were not properly before the Commission and would only be adjudicated if made in connection with a duly filed Petition for Waiver of the requirements of Section 74.1107.

15. The Commission designated this matter for hearing on an expedited basis, eliminated the usual initial decision of the Hearing Examiner, and required that the Examiner certify the record directly to the Commission for final decision and that the parties file proposed findings of fact and conclusions of law within only seven calendar days after the date the record was closed.

16. On June 10, 1966, Booth, in accordance with the suggestion in the Order to Show Cause, filed a Petition for Waiver and Other Appropriate Relief, in which Booth urged that it should be relieved of the requirements of Section 74.1107 of the Rules if they are held to be validly applicable in this situation. The Petition for Waiver also included a request for authority to continue operation of the CATV system which is the subject of this proceeding until the Commission has had the opportunity to pass on the merits of the Petition for Waiver. On the same date, Booth also filed a Petition for Simultaneous Decision in which it requested that no final decision be issued in the Show Cause Proceeding prior to final action by the Commission on the Petition for Waiver and that the Commission expedite consideration of that Petition.

17. During the course of the hearing, the Hearing Examiner permitted the introduction of evidence on the question of the validity of the rules as applied to the Appellant (e.g., evidence pertaining to Appellant's reliance on the standard set forth in the Public Notice of February 15, 1966). The Hearing Examiner also held that under the terms of the Order to Show Cause, which ordered Appellant to show why a cease and desist order should not issue and under the authority of C.J. Community Services, Inc. v. F.C.C., 100 App. D.C. 379, 246 F. 2d 660 he was

required to accept evidence on the question of Appellant's willingness to comply with the Commission's rules and the past record of performance of the Appellant as a licensee of the Commission (e.g., evidence establishing that the Appellant, as the licensee of seven AM stations and six FM stations, had an unblemished record of performance and that it was not contumacious), and the question of whether the Commission should, in its discretion, issue a cease and desist order prior to its decision on the merits of Appellant's Petition for Waiver.

18. On the latter issue, evidence was adduced showing, among other things, that the Greater Muskegon Area was one of the larger underserved television areas of the United States with no local television service; that no station provides a very high quality (principal community or city grade) signal in the area; that only one television station provides a satisfactory signal to the Greater Muskegon Area; that the CATV system would provide excellent reception of nine television stations to the public, whereas they now only receive one satisfactory signal; that the CATV system provides the public with an opportunity to view a non-commercial educational station which could not otherwise be viewed in the Greater Muskegon Area; that the people in the area want the CATV service; that each and every mayor and supervisor of the communities intended to be served by the Appellant supported the CATV operation and indicated that there was a need for the service; that the applicant for the only UHF channel allocated to Muskegon fully supported the Appellant's CATV operation, including the importation of distant signals; that no one could possibly be harmed by the continuation of service pending resolution of the waiver request, particularly since no UHF stations were on the air or could be on the air in the interim period pending determination of the waiver request; and that Appellant had expended and committed a substantial amount of money in connection with the construction and operation of the CATV system.

19. At the close of the hearing the Hearing Examiner certified the record directly to the Commission. The Broadcast Bureau and the

Appellant, the only two parties to the proceeding, filed Proposed Findings of Fact and Conclusions of Law with the Commission within seven calendar days after the record closed.

20. In its defense, Appellant stated that it was not contumacious and would comply with the Commission's Rules if it were determined they were valid as applied to it and if it were properly determined that its request for waiver should not be granted. It urged that if the rules were valid, the cease and desist order should not be issued until its request for Special Temporary Authority (STA) and its request for waiver were acted on.

21. The Commission decided the rules were valid as to Appellant, but avoided consideration of Appellant's claim that they had illegal retroactive effect because the Commission had affirmatively misled Appellant into commencing operations. It also failed to pass on Appellant's request that because of the misleading effect of the February 15, 1966 Notice, the cease and desist order should be withheld at least until the STA request and the request for waiver were acted on. It rejected Appellant's contention that under the circumstances it was unlawful for the Commission to deprive Appellant of the benefit of the Examiner's initial decision or an initial decision of the Commission en banc.

22. The Commission reversed its Hearing Examiner and held that almost all of the evidence introduced by Appellant should have been excluded. The Commission held it was not required to consider evidence (see par. 17, 18, supra) going to the exercise of its discretion "whether a cease or desist order should be withheld until disposition is made of the pending request for waiver." This, therefore, is not a case in which the Commission having considered evidence going to its discretion, has decided not to exercise its discretion; it is rather a case where the Commission has held that it satisfies the requirements of the Act if it limits a respondent's defense to the sole question of whether it is operating in violation of the rule.

23. Thus, the Commission issued an order requiring Appellant to cease and desist from carrying distant signals over its CATV system in the Greater Muskegon Area. This appeal followed.

II. Statement of Points on Which Appellant Intends To Rely

1. The Commission erred in reversing its Hearing Examiner by excluding material and relevant evidence which the Examiner held he was required to accept under the terms of the Order to Show Cause and controlling case authority; and the Commission erred in holding that it was not required to consider such evidence going to the exercise of its discretion whether a cease and desist order should be withheld until disposition is made of Appellant's pending request for waiver.

2. The Commission erred in limiting the Appellant's defense to the sole question whether it is operating in violation of the rule, particularly since there were overwhelming public interest (see, e.g., par. 18, supra) and equitable (e.g., misleading effect of the February 15, 1966 Public Notice) considerations necessitating continued operation of the CATV system pending the Commission decision on Appellant's request for legitimation; and no public or private interest could have been harmed in this interim period.

3. The Commission erred in not following its own rules, particularly Section 1.91(e), which permits the introduction of evidence of the nature admitted into evidence by the Hearing Examiner but excluded by the Commission.

4. The Commission erred by issuing a cease and desist order prior to its determination on Appellant's request for waiver or final action on Appellant's request for approval to operate its CATV system with the carriage of distant signals in the Greater Muskegon Area.

5. The Commission erred in holding that the rules (Section 74.1107) were valid as to Appellant and in failing to consider Appellant's claim that they had illegal retroactive effect because the Commission had affirmatively misled Appellant by its February 15, 1966 Public Notice into commencing operations.

6. The Commission's top hundred market rule is invalid because it was not legally adopted under the Administrative Procedure Act, particularly since the Commission gave inadequate notice to support final substantive rules and failed to provide the public with a meaningful opportunity to participate in the rule-making proceeding.

7. The Commission erred in failing to mention, let alone consider, Appellant's Petition for Simultaneous Decision and Appellant's request for expedited consideration of its waiver request.

8. The Commission erred in failing to mention, let alone consider, Appellant's request for Special Temporary Authority, which was presented to the Commission on at least three separate occasions in this proceeding.

9. The Commission erred in depriving the Appellant of the benefit of the Hearing Examiner's initial decision, particularly since elements of the credibility and demeanor of a witness were involved; the Commission erred in not issuing a tentative decision by the Commission en banc thereby depriving Appellant of any opportunity to address itself to the conclusions either final or tentative, of any official representative of the Commission.

10. The Commission has no jurisdiction over CATV systems which receive all their signals off-the-air.

11. The Commission's decision is in dereliction of the Commission's duty under the Communications Act of 1934, as amended, and particularly Sections 1, 303 (g), 307 (b) and 312 (b) of the Act.

12. The Commission's decision that the public interest requires the issuance of an order requiring Appellant to cease and desist from carrying 5 distant signals, including a non-commercial educational station, is arbitrary, capricious, and unlawful.

III. Relief Sought

WHEREFORE, Appellant prays that this Court adjudge, order and decree that the Commission's Decision of July 18, 1966 be reversed, vacated, set aside and annulled. Appellant further prays that this Court provide it such other relief as this Court deems just and proper.

Respectfully submitted,

/s/ Marcus Cohn

/s/ Paul Dobin

/s/ Ronald A. Siegel

* * *

Counsel for Booth American Company

Of Counsel:

Cohn and Marks

* * *

August 2, 1966

[Certificate of Service]

[1]

TELEGRAPHIC MESSAGE Official Business U.S. Government

Name of Agency: Federal Communications Commission

APRIL 20, 1966

MUSKEGON TV SYSTEM
MUSKEGON, MICHIGAN 49444

INFORMATION HAS COME TO COMMISSION'S ATTENTION THAT YOUR COMMUNITY ANTENNA TELEVISION SYSTEM BEGAN OPERATION MARCH 17, 1966, IN MUSKEGON, MICHIGAN, AND IS CARRYING SIGNALS OF TELEVISION STATIONS IN CADILLAC, MICHIGAN, CHICAGO, ILLINOIS, MILWAUKEE, WISCONSIN, AND TRAVERSE CITY, MICHIGAN BEYOND THE GRADE B CONTOURS OF THOSE STATIONS.

SECTION 74.1107(a) OF THE COMMISSION'S RULES AND REGULATIONS, ADOPTED IN THE SECOND REPORT AND ORDER IN DOCKET NOS. 14895, 15233, AND 15971 (FCC 66-220, RELEASED MARCH 8, 1966) PROVIDES:

> NO CATV SYSTEM OPERATING WITHIN THE GRADE A CONTOUR OF A TELEVISION STATION IN THE 100 LARGEST TELEVISION MARKETS SHALL EXTEND THE SIGNAL OF A TELEVISION BROADCAST STATION BEYOND THE GRADE B CONTOUR OF THAT STATION EXCEPT UPON A SHOWING, APPROVED BY THE COMMISSION, THAT SUCH EXTENSION WOULD BE CONSISTENT WITH THE PUBLIC INTEREST, AND SPECIFICALLY THE ESTABLISHMENT AND HEALTHY MAINTENANCE OF TELEVISION

[2]

BROADCAST SERVICE IN THE AREA. COMMISSION APPROVAL OF A REQUEST TO EXTEND THE SIGNAL IN THE FOREGOING CIRCUMSTANCES WILL BE GRANTED WHERE THE COMMISSION, AFTER CONSIDERATION OF THE REQUEST AND ALL RELATED MATERIALS IN A FULL EVIDENTIARY HEARING,

DETERMINES THAT THE REQUISITE SHOWING HAS BEEN MADE. THE MARKET SIZE SHALL BE DETERMINED BY THE RATING OF THE AMERICAN RESEARCH BUREAU, ON THE BASIS OF THE NET WEEKLY CIRCULATION FOR THE MOST RECENT YEAR.

SECTION 74.1107(a) WHICH BECAME EFFECTIVE MARCH 17, 1966, IS NOT APPLICABLE TO ANY SIGNALS BEING SUPPLIED BY A CATV SYSTEM TO ITS SUBSCRIBERS ON FEBRUARY 15, 1966 (SEE RULE SECTION 74.1107(d)). MUSKEGON IS WITHIN GRADE A CONTOUR OF A TELEVISION BROADCAST STATION IN GRAND RAPIDS, MICHIGAN. GRAND RAPIDS-KALAMAZOO IS LISTED AS 38TH TELEVISION MARKET IN THE COUNTRY, ACCORDING TO MOST RECENT ARB MARKET RATINGS BASED ON TOTAL NET WEEKLY CIRCULATION. COMMISSION HAS NEITHER RECEIVED ANY REQUEST BY YOU FOR A HEARING UNDER THIS SECTION, NOR GRANTED ANY REQUEST BY YOU FOR WAIVER OF SUCH PROVISIONS.

[3]

IT IS REQUESTED THAT YOU STATE WHETHER YOUR CATV SYSTEM AFTER FEBRUARY 15, 1966, BEGAN TO CARRY SIGNALS OF TELEVISION BROADCAST STATIONS IN CADILLAC, MICHIGAN, TRAVERSE CITY, MICHIGAN, CHICAGO, ILLINOIS, OR MILWAUKEE, WISCONSIN BEYOND THEIR GRADE B CONTOURS. SPECIFICALLY, YOU ARE REQUESTED TO ADVISE THE COMMISSION OF THE DATE ON WHICH OPERATIONS BEGAN, AND THE SIGNALS WHICH ARE BEING CARRIED ON THE SYSTEM. IF YOUR OPERATIONS ARE NOT IN COMPLIANCE WITH SECTION 74.1107(a), YOU ARE ALSO REQUESTED TO STATE WHETHER YOU INTEND TO CEASE OPERATIONS NOT IN COMPLIANCE WITH RULES AND, IF SO, WHEN. YOUR REPLY SHOULD BE SUBMITTED BY RETURN WIRE AND IN NO EVENT LATER THAN THE CLOSE OF BUSINESS ON APRIL 28, 1966.

BEN F. WAPLE, SECRETARY
FEDERAL COMMUNICATIONS COMMISSION

[Received April 28, 1966]

Law Offices
COHN AND MARKS

April 28, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D.C. 20554

Dear Mr. Waple:

This is in reply to your telegram of April 20, 1966, in which you request information concerning the operation of the CATV system owned by Muskegon Television System. The undersigned is communications counsel for Muskegon Television System and Muskegon Television System has authorized the undersigned to submit this reply by letter so that we cant meet the deadline on a reply which you have imposed in your wire.

Muskegon Television System during 1965 planned the construction of a CATV system to serve the Muskegon area of Michigan. Although there are separate governmental divisions in this area, the system itself was designed as one complete system to serve Muskegon, North Muskegon, Muskegon Township, Muskegon Heights, Norton Township and Roosevelt Park. Licenses and franchises for this system were issued on the following dates:

North Muskegon	Franchise 25 years	August 23, 1965
Muskegon	License (Indefinite)	August 24, 1965
Muskegon Township	License (Indefinite)	November 17, 1965
Muskegon Heights	License (Indefinite)	December 20, 1965
Norton Township	License (Indefinite)	November 23, 1965
Roosevelt Park	License (Indefinite)	February 25, 1966

Agreements with the General Telephone Company to supply distribution cable were entered into as franchises and licenses were granted. The dates the Telephone Company agreements were signed are as follows:

North Muskegon	August 25. 1965
Muskegon	August 25, 1965
Muskegon Township	December 22, 1965
Muskegon Heights	December 22, 1965
Norton Township	December 22, 1965
Roosevelt Park	November 24, 1965

Work was started by the Telephone Company in December, 1965. The first phase of cable distribution was completed in January, 1966. Head end equipment was completed and ready on February 1, 1966. The phone company completed trunk and distribution cable in North Muskegon early January, 1966 and placed cable in the City of Muskegon in late January and the first week in February, 1966. Connections to subscribers were started February 16, 1966 and on February 25, 1966, sixty were completed as dead drops. Service was begun on March 9, 1966, with thirty connected subscribers. The television stations carried on the cable on March 9 and since then, are as follows:

Channel 3	Kalamazoo, Michigan
Channel 4	Milwaukee, Wisconsin
Channel 5	Chicago, Illinois
Channel 6	Milwaukee, Wisconsin
Channel 8	Grand Rapids, Michigan
Channel 9	Cadillac, Michigan
Channel 10	Milwaukee, Wisconsin
Channel 12	Milwaukee, Wisconsin
Channel 13	Grand Rapids, Michigan

On March 17, 1966, the above stations were carried to approximately seventy attached subscribers.

First, the question of the validity of the use of February 15, 1966, as the cut-off date is presently being litigated by other parties and it is the position of Muskegon Television System that that date, if applied to its own CATV system, is arbitrary and invalid. Until decided by a court of appropriate jurisdiction, it is the position of Muskegon Television System that the proper cut-off date should be March 17, 1966 and if this date is used, the Muskegon Television System operation would be fully in accord with the Commission's Rules.

Second, it is the position of Muskegon Television System that the rules as applied to it are arbitrary and invalid insofar as the Commission failed to provide proper notice to Muskegon Television System before their adoption.

If it is determined that the February 15, 1966 cut-off date is valid and applied to Muskegon Television System, and it is determined that the rules of the Commission are valid as applied to Muskegon Television System, then it is the intention of Muskegon Television System to file an appropriate request for waiver of the Commission's rules and to comply with whatever decision may be properly reached at the conclusion of the proceedings on such a waiver.

[7]

[7]

Muskegon Television System has proceeded with the construction and operation of its CATV system with diligence since the award of its first franchise in August of 1965, Muskegon has no television stations of its own and the CATV system provides a needed service to the residents of the Muskegon area. It would be unfair to both Muskegon Television System and the residents of the area to require a cessation of the service offered by the Muskegon Television System pending resolution of the questions referred to above. If, in the opinion of the Commission, authority is needed to continue operation under the circumstances described above prior to the final adjudication of the validity of its rules as applied to Muskegon Television System authority is requested to continue the service now being offered by the system pending resolution of the matters referred to above.

Very truly yours

BOOTH COMMUNICATIONS COMPANY

By /s/ Paul Dobin

[8]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 66-419
83153

In the Matter of	)	
	)	
Cease and Desist Order	)	
to be directed against	)	Docket No. 16635
Muskegon Television System	)	
and Booth Communications	)	
Company, owners and opera-	)	
tors of a community antenna	)	
television system at	)	
Muskegon, Michigan	)	

ORDER TO SHOW CAUSE

By the Commission: Commissioner Bartley dissenting and issuing a statement; Commissioner Cox absent; Commissioner Loevinger abstaining from voting.

1. The Commission has under consideration the issuance of an order directed against Muskegon Television System and Booth Communications Company [1/] (hereafter MTS and Booth) owners and operators of a community antenna television system at Muskegon, Michigan, to cease and desist from operations in violation of Section 74.1107 of the Commission's Rules and Regulations promulgated under the Communications Act of 1934, as amended. By a telegram sent April 20, 1966, the Commission requested information from MTS concerning its operation, and inquired whether MTS would voluntarily cease any violations of the Commission's Rules and Regulations.

2. From the information before the Commission, the relevant facts appear to be as follows: MTS began carrying the signals of six (6) television broadcast stations beyond their Grade B contours after February 15, 1966. MTS has been given the following authorizations from communities in the Muskegon, Michigan area, to provide CATV service:

Community	Authority	Date of Authority
North Muskegon	Franchise (25 years)	August 23, 1965
Muskegon	License (Indefinite)	August 24, 1965
Muskegon Township	License (Indefinite)	November 17, 1965
Muskegon Heights	License (Indefinite)	December 20, 1965
Norton Township	License (Indefinite)	November 23, 1965
Roosevelt Park	License (Indefinite)	February 25, 1966

1/ Muskegon Television System is a subsidiary of Booth Communications Company.

[9]

Pursuant to agreements between MTS and the General Telephone Company, cable distribution work began in December 1965, and the first phase was completed in January 1966. The phone company completed trunk and distribution cable in North Muskegon in early January 1966 and placed cable in the City of Muskegon in late January 1966, and in the first week of February 1966. On March 9, 1966, service began to thirty (30) connected subscribers. The following "distant signals" as defined in Rule Section 74.1101(i) are being provided:

WMAQ-TV, Channel 5	Chicago, Illinois
WTMJ-TV, Channel 4	Milwaukee, Wisconsin
WITI-TV, Channel 6	Milwaukee, Wisconsin
WMVS-TV, Channel 10	Milwaukee, Wisconsin
WISN-TV, Channel 12	Milwaukee, Wisconsin
WWTV, Channel 9	Cadillac, Michigan

All of the above-mentioned communities, except Muskegon Township, are located beyond the predicted Grade B contours of all the foregoing stations. Muskegon Township is located within the predicted Grade B contour of WWTV, only. MTS is also supplying to its subscribers the signals of Television Broadcast Stations WKZO-TV, Channel 3, Kalamazoo, Michigan, and Channels 8 (WOOD-TV), Grand Rapids -

Kalamazoo, and 13 (WZZM-TV), Grand Rapids. Grand Rapids-Kalamazoo is ranked by the American Research Bureau as the 38th "television market" based on net weekly circulation figures for 1965. Muskegon is within the predicted Grade A contour of WZZM-TV.

3. On March 8, 1966, the Commission adopted rules for the regulation of all CATV systems. The rules are set forth in the Commission's Second Report and Order in Docket Nos. 14895, 15233 and 15971 (FCC 66-220), 2 FCC 2d 725, which was published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107 of the rules sets forth certain requirements and procedures for CATV systems operating in the 100 highest ranked television markets as determined by the American Research Bureau net weekly circulation figures for the most recent year, and provides, in substance, insofar as pertinent here, that effective upon publication in the Federal Register (March 17, 1966) no CATV system commencing operation after February 15, 1966, and located within the predicted Grade A contour of a television station in one of the 100 largest television markets, shall provide service to subscribers which would extend the signal of any television station beyond its predicted Grade B contour, except upon a showing, made in evidentiary hearing and approved by the Commission, that such extension of the signal would be consistent with the public interest. The request for an evidentiary hearing is to be made by the CATV system and shall contain the information specified in the rule.[3/]

3/ On February 15, 1966, the Commission had issued a Public Notice (No. 79927) announcing its intention to regulate CATV systems. The Commission announced that it was asserting jurisdiction over all CATV

[10]

4. Neither MTS nor Booth has sought an evidentiary hearing pursuant to Section 74.1107 but are violating the provisions of that

Section. They contend that the rules as applied to MTS are "arbitrary and invalid," and aver that the proper cut-off date should be March 17, 1966, instead of February 15, 1966. They state that if it is determined that the February 15, 1966, cut-off date is valid and applicable to this case, and if it is determined that "the rules of the Commission are valid as applied to Muskegon Television System," then MTS will file a petition for waiver of those rules and will abide by any Commission decision thereon. In the meantime, permission to continue operating temporarily is sought. That request will be denied. The arguments made in support of continued operation are not properly before us and will only be adjudicated if made in connection with a petition for waiver of Section 74.1107, duly filed under Section 1.3 of the Rules.

5. In the Second Report and Order we indicated that we would take action expeditiously in the event of a violation of Section 74.1107 of the Rules. We acknowledged "the very great desirability" of avoiding the disruption of CATV service to the public which would result from action applicable to an operating CATV system. Clearly, time is of the essence here. This part of the rules was made effective upon publication so that the Commission could proceed forthwith against any system contravening the rules. The public interest requires that insofar as possible the situation in Muskegon be held in status quo. The Commission finds that due and timely execution of its functions in this matter imperatively and unavoidably require that the Examiner certify the record, upon its closing, immediately to the Commission for final decision. Expedition also requires that the parties file their proposed findings of fact and conclusions of law within seven (7) calendar days after the date the record is closed. We note in connection with the imposition of this time schedule that there is only one issue to be resolved, i.e., compliance with the rule.

6. IT IS ORDERED, This 11th day of May, 1966, That pursuant to Sections 312(b) and (c) and 409(e) of the Communications Act of 1934, as amended, 47 U.S.C. 312(b) and (c), and 409 (a), Muskegon Television System and Booth Communications Company, ARE DIRECTED TO SHOW CAUSE why they should

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3/ (cont.)

systems, whether or not served by microwave relay, and that persons obtaining state or local franchises to operate CATV systems in the 100 highest ranked television markets, where the system would extend the signals of television broadcast stations beyond their predicted Grade B contours, would be required to obtain Commission approval before such CATV service to subscribers could be commenced. It was announced at that time that an evidentiary hearing would be held as to all such requests for Commission approval, subject to the general

not be ordered to cease and desist from further operation of a CATV system in Muskegon and North Muskegon, and in any other community named in paragraph 2, above, which extends the signals of television stations beyond their Grade B contours in violation of Section 74.1107 of the Commission's Rules and Regulations.

7. IT IS FURTHER ORDERED, That Muskegon Television System and Booth Communications Company are directed to appear and to give evidence with respect to the matters cited above at a hearing 4/ to be held at Washington, D.C., at a time and before an Examiner to be specified by subsequent Order, unless the hearing is waived, in which event a written statement may be submitted.

8. IT IS FURTHER ORDERED, That upon the closing of the record it shall be certified immediately to the Commission for final decision and that the parties hereto shall file proposed findings of fact and conclusions of law within seven (7) days after the date the record is closed.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send copies of the Order by Certified Mail - Return Receipt Requested, to Muskegon Television System and to Booth Communications Company.

FEDERAL COMMUNICATIONS COMMISSION*

/s/ Ben F. Waple
Secretary

Released: May 13, 1966

*See Attached Dissenting Statement of Commissioner Bartley

3/ (cont.)

waiver provisions of the Commission's Rules. Notice was given that this aspect of the Commission's regulatory program would be applicable to all CATV operations commenced after February 15, 1966.

4/ Section 1.91(c) of the Commission's Rules provides that a respondent in order to avail itself of the opportunity to be heard shall, in person or by its attorney file with the Commission within thirty days of the receipt of the Order to Show Cause, a written statement stating that it will appear at the hearing and present evidence on the matter specified in the Order. If the respondent fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty days of the receipt of the Order to Show Cause. In the event the right to a hearing is waived, the Review Board shall terminate the hearing proceeding and certify the case to the Commission. Thereupon the matter will be determined by the Commission.

[12]

DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I dissent. It appears from the information before us that the respondents have not contravened Section 74.1107 of our Rules since operations were begun before March 17, 1966, the date upon which the said rule was to become effective.

BOOTH'S EXHIBIT A [19]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Cease and Desist Order	)	
to be directed against	)	Docket No. 16635
Muskegon Television System	)	
and Booth Communications	)	
Company, owners and opera-	)	
tors of a community antenna	)	
television system at Muskegon,	)	
Mighican	)	

STATEMENT OF EDWARD H. CLARK

[20]

STATEMENT OF EDWARD H. CLARK

My name is Edward H. Clark and I am Vice-President of Booth American Company (hereinafter referred to as Booth) actively supervising its broadcast and CATV operations. I am also a qualified engineer and my qualifications are a matter of record with the FCC. I have prepared the engineering portions of innumerable applications filed by Booth American Company (formerly Booth Broadcasting Company), including applications in the television field. I have testified as an expert engineer in at least six AM cases and in the Channel 10 Onondaga television proceeding in Docket No. 11169, et. al.

I have personally been involved in broadcasting since 1920 ~~and I have always attempted to comply with the Commission Rules and Regulations~~. I have held a radiotelephone first-class operator's license (current License No. P1-19-10463) in excess of 30 years, and I have never had a citation issued against me.

Booth itself ~~is a long time licensee of the Commission, having~~ [has] been in the broadcast field for over 25 years. It is presently the licensee of the following seven standard broadcast stations and six

frequency modulation broadcast stations: WABQ, WXEN-FM, Cleveland, Ohio; WTOD AM-FM, Toledo, Ohio; WIBM AM-FM, Jackson, Michigan; WIOU, WKMO (FM), Kokomo, Indiana; WJLB, WMZK (FM), Detroit,

[21]

Michigan; WJVA AM-FM, South Bend, Indiana; and WSGW, Saginaw, Michigan. I have been associated with Booth since 1940. I started with Booth in the position of Chief Engineer for Station WMBC, Detroit, Michigan (now WJLB). I have been Vice-President of Booth since 1947 at which time I began supervising the broadcast operations of Booth.

Booth's record of performance in the public interest is a matter of Commission public record. All of its license renewal applications have been readily granted in the ordinary course of Commission business. Booth has never been fined or otherwise penalized by the Commission. It is not contumacious and when the Commission in its telegram of April 20, 1966 first raised the question of possible impropriety in the operation of the Muskegon CATV system, Booth promptly stated in its reply of April 28, 1966 that if it was determined that the rules were valid as applied to its system, it would file an appropriate request for waiver and it stated further its intention "to comply with whatever decision may be properly reached at the conclusion of the proceedings on such a waiver." The letter from Booth stated further:

> Muskegon Television System has proceeded with the construction and operation of its CATV system with diligence since the award of its first franchise in August of 1965. Muskegon has no television stations of its own and the CATV system provides a needed service to the residents of the Muskegon area. It would be unfair to both Muskegon Television System and the residents of the

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[22]

area to require a cessation of the service offered by the Muskegon Television System pending resolution of the questions referred to above. If, in the opinion of the Commission, authority is needed to continue operation under the circumstances described above prior to the final adjudication of the validity of its rules as applied to Muskegon Television System, authority is requested to continue the service now being offered by the system pending resolution of the matters referred to above.

Booth has stated, and repeats here, its intention to comply with the Commission's rules if they are held to be validly applicable to its operation and if its request for waiver is lawfully rejected. The reasons why Booth cannot unconditionally agree to comply with the rules by immediately ceasing operations in North Muskegon and Muskegon are set forth in detail below. Briefly stated, it would in our opinion be manifestly unfair to the public and Booth, if the CATV system were to immediately stop service before it is determined whether the Commission's rule is validly applicable to our operation. Even in the event the rule was validly applicable here, it would be equally unfair to force the CATV system to cease operations before the Commission disposes of the petition for waiver, particularly since we have presented what we consider legitimate and strong public interest reasons in that petition showing that there is a substantial need for the service. Therefore, I do not believe that there is any need to issue a Cease and Desist Order in this proceeding since we will comply with the Commission's rule if the waiver request is lawfully rejected.

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In mid-1964 Booth made a survey of the Muskegon area to determine whether it was advisable to install a CATV system in that area. In the fall of 1964, several conferences were held, including

various discussions with General Telephone of Michigan, concerning the proposed CATV operation. These preliminary conferences and studies, including engineering surveys, reflected the advisability of establishing a CATV system to serve the Greater Muskegon Area and, as a result, specific plans were formulated to establish a CATV system to serve this area.

Booth's CATV system was designed as one complete system to serve the entire community.[1/] On December 18, 1964, Booth filed its proposal to construct and operate a CATV system in Muskegon and contiguous areas with the local authorities in Muskegon and, at the same time, requested a license from Muskegon to permit Booth to institute its CATV service in that city.[2/] Thereafter, on February 4, 1965, applications were filed with the other local authorities (North Muskegon, Muskegon Township, Muskegon Heights, Norton Township

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1/ See Booth Exhibit 1 for statement of John Duncan, Executive Vice President, Muskegon Area Development Council, concerning the composition of the Greater Muskegon Area.

2/ "Booth Broadcasting Co., Inc.'s Proposal for a CATV System for Muskegon and Contiguous Urbanized Areas" was submitted to local authorities in Muskegon on December 18, 1964. This document was also utilized in connection with the applications made to the other divisions of the Greater Muskegon Area.

and Roosevelt Park) requesting, in effect, that each pass an ordinance providing for the licensing and operation of the CATV system within their boundaries. While the initial proposal and request for a license was filed with Muskegon prior to February 4, 1965 (i.e., on December 18, 1964), another request that an ordinance be adopted permitting CATV construction and operation in that city was filed by Booth on June 25, 1965. The dates on which the ordinances permitting CATV operations were adopted as well as the dates on which Booth filed applications requesting authority to construct and operate a CATV

system pursuant to those ordinances are as follows:

	Ordinances Adopted	Requests for Franchise and Licenses
North Muskegon	August 16, 1965	August 16, 1965
Muskegon	August 24, 1965	August 25, 1965
Muskegon Township	October 4, 1965	November 11, 1965
Muskegon Heights	November 8, 1965	December 14, 1965
Norton Township	September 21, 1965	November 5, 1965
Roosevelt Park	December 20, 1965	December 31, 1965

Licenses and franchises for the system were issued on the following dates:[3/]

North Muskegon	Franchise 25 years	August 23, 1965[4/]
Muskegon	License (indefinite)	September 7, 1965

3/ Under the express terms of the licenses, Booth's CATV system is prohibited from originating any programs other than time, weather and music and Booth, of course, intends to comply with the terms of the licenses.

4/ A preliminary franchise fee of $1,000 was paid by Booth to North Muskegon. Under the terms of the franchise, it becomes void in the event that Booth cannot, for any reason, furnish service to subscribers within 18 months of the effective date of the franchise.

[25]

Muskegon Township	License (indefinite)	November 17, 1965
Muskegon Heights	License (indefinite)	December 20, 1965
Norton Township	License (indefinite)	November 23, 1965
Roosevelt Park	License (indefinite)	February 25, 1966

Agreements with the General Telephone Company to supply distribution cable ~~were entered into as franchises and licenses were granted. The dates the Telephone Company agreements~~ were signed are as follows:

North Muskegon	August 25, 1965
Muskegon	August 25, 1965
Muskegon Township	December 22, 1965
Muskegon Heights	December 22, 1965

Norton Township	December 22, 1965
Roosevelt Park	November 24, 1965 (agreement deferred until March 8, 1966)

Prior to the signing of the above agreements, initial conferences were held in the fall of 1964 with the Telephone Company concerning the proposed CATV system for the Greater Muskegon Area. Shortly thereafter, preliminary steps were taken to institute the new service. The Michigan Public Service Commission approved General Telephone Company of Michigan's proposed CATV tariff as early as March 18, 1965. I personally informed the Telephone Company that Booth desired to start the CATV service by December 31, 1965. The first plans entered into between Booth and the Telephone Company called for the installation of cable in both North Muskegon and Muskegon, the goal being the commencement of service in both areas at an early date.[5/] Thus, the agreement between Booth and General

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5/ See Booth Exhibit 2.

Telephone Company to construct the CATV facilities in North Muskegon and Muskegon were signed on the same date (August 25, 1965) and the major materials needed to start construction in both areas were ordered by the Telephone Company on August 27, 1965. The Telephone Company actually commenced the engineering portion of the job on September 1, 1965, and construction of the system was begun on ~~September~~ [October] 4, 1965. The first phase of cable distribution, i.e. the installation of trunk and distribution cable in North Muskegon was, in fact, completed by January 14, 1966, and the Telephone Company was ready to connect dead drops on that date. Prior to February 15, 1966, Booth requested the Telephone Company to install the dead drops [in North Muskegon,] and 36 were, in fact, installed prior to February 15th. The only reason why the CATV service could not be instituted in that area prior to February 15, 1966 was that

construction of the tower was unforeseeably stalled because of an unusually long delay in obtaining FAA approval for the proposed 403-foot tower ~~and~~ [on] the proposed site. A request for FAA approval was made by Booth on November 29, 1965, and the final FAA approval was not ~~received~~ [issued] until February 25, 1966. Consequently, the tower was not completed until March 3, 1966. Head end equipment, however, was completed and ready on February 1, 1966. It should be noted that there is only one head end which feeds the trunk cable in the Greater Muskegon Area. Meanwhile,

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on September 17, 1965, the Telephone Company had also started its engineering plans to place cable in the City of Muskegon, and actual construction was commenced on January 3, 1966. By March 3, 1966, portions of the cable in Muskegon were in place and at that point were ready for dead drop connections (See Booth Exhibit 2).

At this point I would like to state that, while I was aware of the Notice of Inquiry of April 29, 1965, I did not believe that this Notice would eventually lead to restrictions on the growth of a CATV system in places such as Muskegon. Based on the April 29, 1965 Notice, I felt that there was no reason to forego future expenditures of funds and undertakings looking toward the early construction of our system in that area. From reading the Notice of Inquiry, I thought that the Commission would either conduct further proceedings or go to Congress before adopting final CATV rules. I felt final rules, if they were adopted, would not prohibit CATV service in an area such as Muskegon which has no local service and little reception service. I further felt that the Notice of Inquiry itself did not provide a basis for halting plans for the institution of a CATV service in Muskegon. Since my study of the Muskegon area disclosed a ~~public~~ need and interest for additional reception service by means of the CATV system, we proceeded with the venture in an effort to bring the new service to the people of the Muskegon area at an early date.

Even prior to the completion of construction, Booth began to receive applications for service from persons residing in each of the governmental divisions, most of the applications being accompanied by a check or cash deposit. Our records reflect that a total of 179 applications, including 81 applications from people residing in North Muskegon and 67 applications from people residing in Muskegon, were received and accepted by Booth prior to February 15, 1966 (see Booth Exhibit 3). As I will describe below, Booth made strong representations to these customers that the CATV service would include the importation of "distant signals." Prior to February 15, 1966, Booth had committed itself to provide CATV service to these customers, including the provision of "distant signals."

Wide publicity of the proposed CATV system appeared in The Muskegon Chronicle, a local daily newspaper, during the late summer and early fall of 1965. I read the newspaper articles published in this newspaper pertaining to the Booth CATV system. These articles talked in terms of establishing a CATV system to serve the entire Greater Muskegon Area and also indicated that the service would include the carriage of signals ("distant signals") not previously available to the area without the facilities of a CATV system. The articles further pointed out that the system would provide better reception of stations already received in the area, and that it would also substantially improve color reception. Booth made plans for an extensive advertising campaign in early

January, 1966. Twelve separate advertisements had appeared in The Muskegon Chronicle newspaper by March 17, 1966, the first one appearing on February 3, 1966. All of these advertisements stressed the fact that a large number of so-called "distant signals" would be offered over the CATV system.

Shortly after February 15, 1966, Booth was informed by its counsel of the Commission's issuance of its February 15, 1966 Public Notice and Booth also received a copy of that Notice (Booth Exhibit 7). I read the Notice carefully and noted that the Commission announced for the first time that it decided to assert jurisdiction over all CATV systems whether or not served by microwave relay and that it also described the substance of its new rules. I particularly noted that the Commission announced its policy with respect to the importation of "distant signals" in the 100 highest ARB ranked television markets, i.e. that a hearing would be necessary before the CATV system would be permitted to carry such "distant signals". It stated that this "hearing requirement would apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market" (emphasis added). But it was also stated that "Commission prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings".

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I carefully reviewed the proposed Muskegon CATV operation in light of this notice. I observed that Muskegon was not located within the Grade A contour of all the existing television stations in the combined Grand Rapids-Kalamazoo television market, which is ranked by ARB as the 38th largest television market in the country. Stations WKZO-TV (Channel 3), Kalamazoo and WOOD-TV (Channel 8), Grand Rapids place a predicted Grade B coverage contour over Muskegon, not a Grade A contour. I found that the CATV system was located within the Grade A contour of only one television station, WZZM-TV, located in Grand Rapids. Under the Commission's new standards, therefore, it seemed clear to me that the Muskegon CATV system was not located within the top 100 ARB television markets and the Commission expressly stated that the hearing requirements was not applicable in this situation (i.e. in television markets below the

100 largest ARB markets). I, therefore, came to the affirmative conclusion that the Notice placed no bar upon the establishment of the proposed CATV system and that no further permission would be required from the Federal Communications Commission before proceeding further. In light of the prior commitments which had been made by Booth, I proceeded with all steps required for the institution of service. ~~It must be emphasized, however, that we took no unusual steps to accelerate the institution of service and conducted its business in a normal manner.~~

[31]

By February 15, 1966, 36 dead drops were already connected to homes in North Muskegon and prior to March 17, 1966, ~~approximately~~ 124 connections were completed as dead drops. Since I believed that the rules announced in the February 15, 1966 Public Notice permitted us to institute service, service was begun in North Muskegon on March 4, 1966, one day after the tower was completed, and there were approximately 124 subscribers receiving service by March 17, 1966. Additionally, our records show that the total number of applications for service accepted from persons residing in North Muskegon increased from 81 as of February 16, 1966 to 163 as of March 17, 1966. During this time the total number of applications accepted from persons residing in Muskegon increased from 67 to 180. ~~Similarly~~, The number of service applications received from persons residing in the other portions of the Greater Muskegon Area ~~more than doubled between~~ [increased from 29 to 77] February 16, 1966 and March 17, 1966 (Booth Exhibit 3).

Booth intended in the course of normal operations to start service in Muskegon during the first week of March, 1966. Cable installations in some portions of Muskegon were already complete and ready to be connected to the subscribers' television sets [by March 3, 1966]. However, an engineering problem that had arisen in connection with the laying of cable across the Causeway which separates North

Muskegon and Muskegon made it impossible to institute service in Muskegon on the same date that service was started in North Muskegon, (i.e., on March 4, 1966.) [(Exhibit 2)]. Since it was not feasible

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to place cable above the highway, a special underground double-jacketed cable had to be ordered to connect the cable on the one side of the highway to the cable on the other side. The delay in receiving the underground cable and the time consumed in installing it caused a delay in the institution of service. Otherwise, I am reasonably certain that service would have been instituted in some portions of Muskegon as planned in the first week of March. Service was, in fact, initiated on April 15, 1966.

The television stations carried on the cable to the subscribers residing in North Muskegon and Muskegon are as follows (based on the station's predicted contours):

Stations Within Whose Predicted Grade A Contours North Muskegon and Muskegon Are Located (1)

Station WZZM-TV, Grand Rapids, Michigan (Channel 13)

Stations Within Whose Predicted Grade B Contours North Muskegon and Muskegon Are Located (2)

Station WKZO-TV, Kalamazoo, Michigan (Channel 3)
Station WOOD-TV, Grand Rapids, Michigan (Channel 8)

[33]

Stations Beyond Whose Predicted Grade B Contours North Muskegon and Muskegon Are Located (6)

Station WTMJ-TV, Milwaukee, Wisconsin (Channel 4)
Station WMAG-TV, Chicago, Illinois (Channel 5)
Station WITI-TV, Milwaukee, Wisconsin (Channel 6)
Station WWTV, Cadillac, Michigan (Channel 9)[6/]
Station WMVS-TV, Milwaukee, Wisconsin (Channel 10)
Station WISN-TV, Milwaukee, Wisconsin (Channel 12)

When I became aware of the change in the ~~substantive standard~~ [language of the Commission] relating to the carriage of "distant signals" brought about by the Second Report and Order,[7] I attempted to review the applicability of the Commission's rules, as adopted, to the proposed Booth CATV system. I believed that the legal situation was confused and uncertain. I felt that, in light of the fact that we had proceeded in good faith after the Notice of February 15, 1966, it was appropriate for Booth to maintain the service in North Muskegon and to institute the service in adjoining Muskegon which was part of the same system and the plans for which had been made in reliance on the February 15, 1966 Notice. Under the terms of the agreement with the Telephone Company, payment was to commence when the cable was ready for use. Booth had been advised, even prior to February 15, 1966, that the cable for Muskegon would be ready at an early date. When the cable

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6/ The predicted Grade B coverage contour of Station WWTV covers only a very small portion of North Muskegon and Muskegon.

7/ The rule announced in the Second Report and Order changed the relevant geographical area from communities lying within the Grade A contour of all existing television stations in one of the 100 largest ARB markets (as announced in the February 15 Public Notice) to communities within the Grade A contour of one television station located in the major market. The new rule in the Second Report and Order was made retroactive as of February 15, 1966.

for Muskegon became ready after March 17, 1966, Booth was obligated to pay the Telephone Company for that cable, whether or not it was used. Postponement of the commencement of service would not have delayed commencement of payment to the Telephone Company. Furthermore, the public in Muskegon, from which Booth at the time had ~~163~~ [180] applications for service, expected that early commencement of service would begin when the cable was ready. I, therefore, felt that it would be inequitable to both Booth and the public to postpone

the commencement of service in Muskegon until the legal situation was clarified. At about the same time it commenced service in Muskegon, I instructed our counsel to take appropriate legal action insofar as any was required. I also point out that, aside from North Muskegon and Muskegon, service has not commenced in any other portion of the Greater Muskegon Area and that I have officially instructed the Telephone Company to suspend construction in these other areas. No further major construction will take place and service will not begin in these other areas without necessary lawful authority.

The status of engineering and construction of the CATV system is shown in Booth Exhibit 2. Additionally, the location of the head end, the extent of trunk cabling as of April 20, 1966 (Map 2), and the maximum proposed area in which cable will eventually be installed (Map 1) is described

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in Booth Exhibit 8. It is pertinent to note that the system, even if operating at maximum capacity, as shown by Map 1, is a small operation. Thus, at its widest point (i.e., parallel to Muskegon Lake) the whole area involved is only approximately 7-1/2 miles long from one end to the other.

Booth has made substantial expenditures and commitments in connection with its CATV system in the Greater Muskegon Area. Booth expended ~~$90,549.61~~ [$91,549.61] and had firm financial commitments of $127,050.00 prior to February 15, 1966. Additionally, prior to February 15, 1966, Booth had entered into a five-year contract with General Telephone Company of Michigan to lease 403 miles of cable at $768 per mile each year, or a total of $1,547,520. Subsequent to February 15, 1966, an additional $31,518.39 was expended towards the CATV operation. Thus, as of April 30, 1966, total expenditures and commitments have amounted to ~~$1,796,280~~. [$1,797,638.00]. The details of these expenditures and commitments are set forth in Booth Exhibit 8.

~~In my opinion, the people of North Muskegon and Muskegon, as well as the people in the other portions of the Greater Muskegon Area, want, need and expect CATV service to be established in this area.~~ In view of our obligations and commitments to the people, combined with the ~~public~~ demand for the new service, Booth cannot unconditionally agree to comply by immediately ceasing operations in North Muskegon and Muskegon before resolution of the questions raised by this proceeding. I repeat

[36]

again, however, that we intend to comply with the Commission's rule if they held to be validly applicable to our CATV operation and if our request for waiver is lawfully rejected.

I believe that the public demand for our CATV service is shown by the large number of applications for service received by Booth from persons residing throughout the Greater Muskegon Area. A total of 1,011 applications requesting connection to the CATV system were already accepted as of May 26, 1966. Of this number, 222 applications were from North Muskegon and 501 applications were from Muskegon. There has even been a demand for our CATV service in areas in which licenses have not yet been granted. Twenty-two applications for service were received by Booth from Laketon Township at a time when Booth had not yet obtained licenses for this area.[8/] These applications requested in effect that the service be extended by Booth to that area. There were approximately 357 subscribers (250 in North Muskegon and 107 in Muskegon) enjoying the CATV service, as of May 26, 1966.

I also feel that Booth has an obligation to the local authorities in North Muskegon and Muskegon to continue service until the questions before the Commission pertaining to our CATV system are resolved. All of the

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8/ Booth has made application for license in Laketon Township, but no action on this application has been taken yet.

local authorities (including North Muskegon and Muskegon) adopted ordinances permitting CATV construction and operation and then granted the franchise and licenses to Booth. ~~because they were satisfied that there was a real need for the new service and that it would serve the public interest in the Greater Muskegon Area.~~ The individual Mayors and Supervisors of each division of the Greater Muskegon Area and have specifically endorsed Booth's CATV operation.[9/]

~~In these letters, each of these community leaders indicated that the CATV system would be very beneficial for the community because it would provide the residents of the area with an opportunity to increase the number of television channels they can view on their television sets and also give them better reception of the several stations they already receive. Several of them specifically indicated that the new service offered by Booth would provide broader and much more complete television coverage of news, sports, education and other programs of interest to television viewers.~~

There are presently no local television stations on the air in the Greater Muskegon Area. As my attached engineering exhibit shows (Booth Exhibit 6), there are only three commercial VHF stations which provide a viewable signal to the Greater Muskegon Area without the use of expensive

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9/ See Booth Exhibit 4 which contains letters from Donald B. Brustad, Supervisor, Muskegon Township, William R. Andree, Mayor, North Muskegon, Kenneth E. Heineman, Mayor, Muskegon Heights, Robert K. Hunter, Supervisor, Norton Township, Dean Recknagel, Mayor, Roosevelt Park, and Henry J. Klevering, Mayor, Muskegon.

outdoor antenna equipment. While the reception of WZZM-TV (Channel 13) in Grand Rapids, which places a Grade A contour over

Muskegon, is generally good, reception of the other two stations, WOOD-TV (Channel 8), Grand Rapids, and WKZO-TV (Channel 3), Kalamazoo, which places only a predicted Grade B coverage contour over Muskegon, is marginal at best due to the terrain and distance from the stations. It is indicated that more than 50% of the television homes in the area receive poor reception from one or both of the Grade B stations, and that reception of color programs from these stations is unsatisfactory in more than 60% of the television homes in the area. This is based upon my observations when Booth was studying the need for a TV source in the area. It is also based on my study of the nature of the terrain lying between Stations WOOD-TV and WKZO-TV in the direction of the Muskegon area. Examination of the license files for these stations and the engineering data submitted by these stations together with the appropriate topographic maps show that along the pertinent radials elevations exist beyond the two-to-ten-mile range which would reduce the predicted signal intensity in the Muskegon area. While I have not made a detailed shadow loss study, it is apparent from inspection of the topographic maps that a satisfactory signal intensity would not be expected in a substantial number of locations in the Muskegon area.

[39]

The CATV will, therefore, at a minimum, provide better reception of these stations. Furthermore, even with tall antenna towers, rotors and high gain antennas, the people in the area can receive, at best, only fringe signals from such cities as Milwaukee and Chicago. Thus, the CATV system will make the important contribution of providing the people of the area with at least six additional television signals which could not otherwise readily be seen in the area, which would significantly increase the viewing opportunities of the residents of this area. In view of the limited number of available signals that can be picked up on the television sets without the facilities of the CATV system, I think that there is a real need for the CATV service offered by Booth.

The increased viewing opportunities presently offered by Booth to the people of North Muskegon and Muskegon is a further reason why Booth cannot unconditionally agree to comply by immediately ceasing operations in these areas. Stated another way, I do not think the people of this area should be deprived of a needed service offered by the CATV system unless the Commission's rule is held to be validly applicable to our operation and the waiver request is denied. ~~In this connection, I would like to point out that~~ As part of the CATV service, the residents of North Muskegon and Muskegon have an opportunity for the first time to view an educational television station via Station WMVS (Channel 10), Milwaukee, Wisconsin, a non-commercial

[40]

educational TV station. ~~I further point out that the CATV system is providing the viewers with a broader coverage of public affairs programs~~. Also, since my familiarity with the Greater Muskegon Area and discussions with members of the public in that area reveal that the community is a sports-oriented one, the CATV system is also fulfilling the needs and desires of the local residents by providing them with increased sports coverage by means of the distant signals carried on the CATV system. The residents of the area, of course, also have a wider choice of other entertainment programs and the opportunity to select programming which is of interest to them from a much larger number of channels than they are now capable of receiving without the facilities of the CATV system. ~~I think it would be unfair to the people of North Muskegon and Muskegon to take away this service before it is determined whether the request for waiver should be granted.~~

As I have already indicated, service to subscribers actually commenced on March 4, 1966 at a time when I thought that the Commission permitted such operation based on the Public Notice of February 15, 1966. Abatement of this existing service (i. e., distant signals) to

customers of the CATV system in North Muskegon and Muskegon combined with the inability to meet the positive commitments made to other subscribers in these two areas to whom service has not yet begun ~~would not only deprive~~

[41]

~~the people of a needed service, but~~ it would ~~also~~ cause irreparable injury to Booth. I believe that the failure of the system to provide distant signals as represented to the city councils and to the public in these areas would destroy public confidence and acceptance of the new service. There are presently nine signals being carried on the CATV system, six of which are considered distant signals according to the Commission's Rules. If the CATV system were forced to operate without the six distant signals, the CATV system would be a financially unsound proposition. There are only three television stations which place a predicted Grade B or better signal over the entire Muskegon area which can be picked up by the television sets in the area, although even reception of these signals, i.e., the Grade B signals, are even poor. The basic purpose of the CATV system as well as the saleability thereof, is to make available signals which cannot readily be picked up by television viewers in the area without the facilities of a CATV system, namely, signals which do not place a Grade B contour over the Greater Muskegon Area. Booth made promises both to the local authorities and the public that it would make available at least six distant signals thereby greatly increasing the viewing opportunities for the public. If the CATV system were prohibited from bringing in these distant signals, I believe that the result would be a loss of existing subscribers and the inability to persuade

new persons to subscribe to the limited service.[10/] As a practical matter, Booth would be compelled to completely discontinue its ~~public service operation~~ [service to the public] in the Greater Muskegon Area if it were permanently enjoined from carrying "distant signals".

But even in the period pending resolution of the waiver request, immediate cessation of existing service in North Muskegon and Muskegon would cause Booth irreparable injury. It is reasonable to anticipate that if the carriage of the six "distant signals" was eliminated, many of the existing subscribers in the area would cancel the service. Additionally, people in these areas who have signed up for the CATV service but are not yet receiving such service would most likely cancel their service contracts. I believe that these people would be reluctant to reinstate their service contracts once the CATV system started full service again, assuming the request for waiver was granted.

I also point out that the continuance of the needed [CATV] service in North Muskegon and Muskegon cannot have an adverse impact on any UHF stations in the area because there are no UHF stations presently on the air in the area. Since applications for the only two UHF channels allocated in the general area, Channel 54, Muskegon, and Channel 17, Grand Rapids, have

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10/ Without the provision of distant signals, the CATV system would merely serve the function of providing better reception of the three television stations whose Grade B contours cover the Greater Muskegon Area.

only just recently been filed and have not been acted on by the Commission yet, it is most unlikely, if not impossible, that either of these proposed stations will be on the air before the waiver request is decided by the Commission. Therefore, no UHF station will be hurt if the existing CATV service is permitted to continue in North Muskegon and Muskegon.

Even looking at the long-range effect of the CATV system on UHF development in the area, I believe that the system will aid the development of these proposed new UHF stations. It should be noted that I have had substantial familiarity with the operations of UHF television stations. Booth was a licensee and operated a UHF station on Channel 64 in Battle Creek, Michigan in about 1953. This license was finally relinquished because of very substantial financial losses incurred in the operation of that station. I personally supervised the operation of that UHF station, as well as the construction thereof.

The Greater Muskegon Area is located in an entirely separate and distinct urbanized area from either Grand Rapids or Kalamazoo. Muskegon is located approximately 35 miles from Grand Rapids and 71 miles from Kalamazoo. Grand Rapids and Kalamazoo are separated by approximately 47 miles.

According to the Commission's allocation table, there is only one UHF channel allocated to the Grand Rapids-Kalamazoo market, i.e., Channel

17 in Grand Rapids. There is presently one application pending before the Commission requesting authority to operate on that channel. There are also two commercial VHF channels allocated to Grand Rapids and one commercial VHF channel allocated to Kalamazoo, all of which are authorized and presently on the air. In Muskegon, however, there are no VHF channels and one UHF channel allocated but not yet authorized, i.e., Channel 54. In May, 1966, Muskegon Telecasting Company, Inc. filed an application requesting a construction permit for Channel 54.

In my opinion, the CATV system will be an affirmative benefit to the potential UHF operations in Muskegon. We intend to carry any UHF station which places a Grade B contour over Muskegon and to afford those stations program protection in accordance with the Commission's Rules. Muskegon Telecasting Company, Inc., a group

composed of local residents of the Muskegon area, has recently filed an application for a new UHF station to operate on Channel 54. It is my understanding that the applicant proposes to operate an independent station. ~~emphasizing programming of interest to the local resident.~~ The applicant has indicated that it fully supports and approves the CATV service including the importation of distant signals offered by Booth in the Greater Muskegon Area (See Booth Exhibit 5). ~~The applicant has specifically endorsed a grant of Booth's petition for waiver so as to permit Booth to bring in distant signals to the community so~~

[45]

~~that the system may survive. The UHF applicant stated that "the CATV system will aid the development of the proposed new UHF station. Since there are presently a limited number of television sets in the area capable of receiving UHF signals, the CATV system, which will carry the UHF station, will provide a means for the proposed new UHF station to immediately reach the homes connected with the CATV system.~~" In my opinion, also, Booth's CATV system will affirmatively help the local UHF station by carrying it on the system.

I further believe that the Muskegon CATV system will not have any adverse impact on the proposed UHF station in Grand Rapids. My study of the application (Allendale Enterprises, Inc.) of the proposed Grand Rapids UHF station shows that it would provide service to approximately 211,309 television homes located within its Grade B contour. On the other hand, it is my opinion that in five years, the CATV system could expand to the point where it is serving approximately 11,500 subscribers, which amounts to only about 5.4% of the total television homes that would be served by the proposed UHF station, assuming that the homes in the coverage area have television sets capable of receiving the UHF signals. Even if the system was to eventually operate at its maximum potential capacity, it would then

serve only about 23,000 subscribers or 10.9% of the total television homes located within the Grade B contour of the proposed UHF station. In view of the small

[46]

number of homes which could eventually be connected to the CATV system as compared to the large number of homes within the proposed UHF station's Grade B contour, I definitely believe that the CATV system would not, in any realistic sense, have an adverse impact on the development of that UHF station (See Booth Exhibit 6).

Based on the fact that this UHF channel (17) is allocated to Grand Rapids, I believe that the proposed UHF station will look to the Grand Rapids market as the basic area in which their prime viewing will occur and from which their economic support must spring, and not Muskegon. In my opinion, the Grand Rapids UHF station, if and when established, will be aided by the CATV system in Muskegon. This aid will arise from the carriage of this station on the system, thus providing the station with a guaranteed number of persons capable of receiving its signal as soon as it goes on the air.

In its Petition for Waiver, Booth renewed its request for authority to operate in Northern Muskegon and Muskegon, pending final resolution of the validity of the rules as applied to it and the determination of its request for waiver.[11/] Booth has suspended construction of its CATV system in

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11/ The Commission in its Show Cause Order of May 13, 1966, did not pass on the merits of Booth's request of April 28, 1966 for interim relief, stating "that the arguments made in support of continued operation are not properly before us and will only be adjudicated if made in connection with a petition for waiver of Section 74.1107 . . . ." Booth immediately started preparation of this petition and has proceeded with all due speed in filing it; and as is evident, extensive preparation was involved.

other areas pending determination of these questions. It seeks temporary authority only where service to the public is already in existense. Since this request for interim relief permitting Booth to continue its operations has not yet been decided by the Commission, this is a further reason why we do not think it appropriate to immediately cease operations in North Muskegon and Muskegon.

BOOTH AMERICAN COMPANY - EXHIBIT 1

STATEMENT OF JOHN DUNCAN,
EXECUTIVE VICE PRESIDENT,
MUSKEGON AREA DEVELOPMENT COUNCIL

[49]

Fourth At Webster . Muskegon, Michigan 49441
MUSKEGON AREA DEVELOPMENT COUNCIL

* * *

May 26, 1966

The Muskegon Area Development Council is a community action organization consolidating the research and action functions of the Muskegon Area Economic Planning and Development Association (MAEPDA) and the Greater Muskegon Chamber of Commerce.

The Greater Muskegon Area is composed of Muskegon, Muskegon Heights, North Muskegon, Roosevelt Park, Muskegon Township, Norton Township, and Laketon Township. Although these components are separative governmental divisions, the area in which they are located is commonly considered to be one geographical area, (The Greater Muskegon Area). The components of the Greater Muskegon area have common and interrelated social, economic, and cultural ties. Business and industrial development is measured in terms of the whole area. The Greater Muskegon Area is one unified community separate and distinct from other communities located throughout the Great Lakes region.

/s/ John Duncan
Executive Vice President
Muskegon Area Development
Council

[50]

BOOTH AMERICAN COMPANY - EXHIBIT 2

PREPARED BY R. E. COFFMAN, MARKETING DIRECTOR, GENERAL TELEPHONE COMPANY OF MICHIGAN

[51]

GENERAL TELEPHONE COMPANY
Of Michigan
860 Terrace Street
Muskegon, Michigan

May 27, 1966

Mr. Ronald Siegel
Cohn & Marks, Attorneys
317 Cafritz Bldg.
Washington, D.C. 20006

Dear Mr. Siegel:

In accordance with the request of Mr. E. H. Clark, Vice President, Booth American Broadcasting, we are attaching herewith the maps and associated information relative to mileage, charges, service order dates, engineering and construction dates for the Greater Muskegon area CATV system. Except for the map reflecting the 14 phases of construction, a copy of all material included herewith is being directed to Mr. Clark.

Please contact the writer if there is other information which you find necessary to prepare for your forthcoming FCC Hearing.

Yours very truly,

/s/ R. E. Coffman
Marketing Director

REC dw

Attachments

CC: Mr. E. H. Clark (w/attachments)

[52]

The Booth Broadcasting Company has signed Service Orders with General Telephone Company of Michigan by which Booth requests General to construct the required necessary facilities in various communities, to provide Community Antenna Television to its customers. These Service Orders are for a period of ten years and provide for a monthly charge of $64.00 per mile of cable provided.

The areas covered, the dates the Orders were signed, the estimated mileage covered and the annual charges are as follows:

AREA COVERED	DATE SIGNED	ESTIMATED MILEAGE	ANNUAL CHARGES
North Muskegon	8-25-65	25.5	$ 19,584
Muskegon	8-25-65	138.5	106,368
Muskegon Township	12-22-65	74.8	57,446
Muskegon Heights	12-22-65	67.8	52,070
Norton Township	12-22-65	83.7	64,281
Roosevelt Park	3- 8-66	12.7	9,753

The above Orders are so written that whenever the Telephone Company releases all or a portion of the above facilities to Booth on a "ready-to-serve" basis, the charges begin on the date the facilities are released. In the event of a cancellation of part or all of the facilities requested to be furnished prior to their "being ready to serve" will subject those facilities constructed to a cancellation charge as provided by Tariff M.P.S.C. No. 13.

[53]

The following schedules show the status of engineering and construction of CATV facilities in the Greater Muskegon Area, sub-divided into areas numbered one (1) through fourteen (14) as shown on the enclosed Street Map of Greater Muskegon.

[53]

	April 29, 1965 to Feb. 15, 1966	Feb. 16, 1966 to Mar. 8, 1966	Mar. 9, 1966 to Mar. 17, 1966	Mar. 18, 1966 to Present
AREA 1				
North Muskegon				
Phase 1				
Engineering started	9- 1-65			
Engineering completed	10- 4-65			
Major material ordered	8-27-65			
Construction started	10- 4-65			
Construction completed	1-14-66			
Drops requested	70	53	15	48
Drops installed	36	53	35	59
AREA 2				
Muskegon				
PHASE 1 SECTION 1				
*see foot note				
Engineering started	9-17-65			
Engineering completed	2- 4-66			
Major material ordered	8-27-65			
Construction started	1- 3-66			
Construction completed				4- 4-66
Drops requested	0	2	0	73
Drops installed	0	0	0	42
AREA 2				
Muskegon				
PHASE 1 SECTION 2				
Engineering started	12- 3-65			
Engineering completed				4-30-66
Major material ordered	8-27-65			
Construction started		3-1-66		
Construction completed				5-27-66
Drops requested	0	0	0	54
Drops installed				

[54]

AREA 3				
Muskegon				
PHASE 2 SECTION 1				
Engineering started		3-7-66		
Engineering completed				Incomplete
Major material ordered	2- 8-66			
Construction started				Not started
Construction completed				
Drops requested	0	0	0	0
Drops installed	0	0	0	0

	April 29, 1965 to Feb. 15, 1966	Feb. 16, 1966 to Mar. 8, 1966	Mar. 9, 1966 to Mar. 17, 1966	Mar. 18, 1966 to Present
AREA 3				
Muskegon				
PHASE 2 SECTION 2				
includes part of Muskegon Heights				
Engineering started				5-11-66
Engineering completed				Incomplete
Major material ordered				Not ordered
Construction started				Not started
AREA 7				
North Muskegon				
PHASE 2				
Engineering started				4-4-66
Engineering completed				Incomplete
Major material ordered	2-8-66			
Construction started				5-16-66
Construction completed				In progress
Drops requested				
Drops installed				

Engineering and Construction have not been started in Areas 4 through 6 and 9 through 14 covering the remaining portions of Muskegon and Muskegon Heights as well as Roosevelt Park and Muskegon, Norton and Laketon Townships.

* The initial cable orders, issued on August 27, 1965, covered the cable required for Area 1 (North Muskegon) and Area 2 (Muskegon). As engineering progressed, it was determined that the most appropriate way of crossing the Causeway into Muskegon was via an underground conduit system, using a double-jacketed cable for added protection. This double-jacketed cable was ordered on December 30, 1965, with a shipping date of January 15, 1966, requested.

[55]

The supplier advised that the earliest shipping date possible was March 1, 1966. The cable was received in mid-March permitting completion of construction. The enclosed drawing designated KEY MAP MUSKEGON CATV PHASE #1 SEC. #1 shows, marked in red, the cable which was in place by March 3, 1966.

[58]

[58]

BOOTH AMERICAN COMPANY - EXHIBIT 3

AFFIDAVIT OF JAMES E. DALEY, MANAGER MUSKEGON TELEVISION SYSTEM

[59]

June 8, 1966

AFFIDAVIT OF JAMES E. DALEY

James E. Daley being duly sworn, deposes and says:

1. I am the Manager of Muskegon Television System, an operating division of Booth American Company, which is engaged in the business of providing Community Antenna Television Service to the Greater Muskegon Area.

2. Planning for the institution of an advertising campaign to promote the CATV service began in the early part of January, 1966. The first advertisement was published in the Muskegon Chronicle on February 3, 1966 and thereafter other advertisements were placed in the same newspaper on a regular basis. Twelve (12) advertisements appeared in this newspaper between February 3, 1966 and March 17, 1966.

3. The table below reflects the number of applications, many of which were accompanied by deposits, for the CATV service received by Muskegon Television System for the various sections on the dates indicated.

	April 29, 1965 to February 15, 1966	February 16, 1966 to March 17, 1966	March 18, 1966 to May 26, 1966	Total
North Muskegon	81	82	59	222
Muskegon	67	113	321	501
Muskegon Township	5	9	59	73
Muskegon Heights	5	16	35	56
Roosevelt Park	5	7	35	47
Norton Township	14	16	60	90
Total	177	243	569	989

[60]

4. Twenty-two applications requesting that the service be offered in Laketon Township were received as of May 26, 1966, six of which were received before March 17, 1966. Booth has made application for a license in Laketon Township but it has not yet been acted on.

/s/ James E. Daley
Manager
Muskegon Television System

[JURAT]

[61]

[61]

BOOTH AMERICAN COMPANY - EXHIBIT 4

STATEMENTS OF MAYORS AND SUPERVISORS OF THE GREATER MUSKEGON AREA SUPPORTING THE BOOTH CATV SYSTEM

[62]

May 27, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

I, Henry J. Klevering, as Mayor of the City of Muskegon endorse and approve the existing CATV service provided by Booth American Company to the people of the area.

The City of Muskegon adopted an ordinance permitting CATV operations in August, 1965, and on August 24, 1965 a license was issued to Booth American Company to operate a CATV system in our City. I believe CATV will be beneficial to the taxpayers in that it will provide a source of additional revenues through license fees, and the CATV service will satisfy a need for better television reception and bring diversified educational as well as other programs to this area.

Very truly yours,

/s/ Henry J. Klevering
Mayor, City of Muskegon

[63]

May 27, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

As the Supervisor of Muskegon Township, I endorse the Booth American Company CATV operations.

In my opinion, the new CATV service will be a valuable asset to the community because it will give the public an opportunity to view a large number of television programs not otherwise available and at the same time provide our area with additional licensing income.

Very truly yours,

/s/ Donald B. Brustad
Supervisor, Muskegon Township

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[64]

May 27, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

As the Mayor of North Muskegon I fully approve of the existing CATV service provided by Booth American Company.

Not only will the CATV operation be beneficial because it will provide a source of revenue for the area, but it will also provide the public with a much broader coverage of the news, educational and other programs.

Very truly yours,

/s/ William R. Andree
Mayor, North Muskegon

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[65]

May 27, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

I, Kenneth E. Heineman, as Mayor of Muskegon Heights, can say that I personally approve of the CATV service offered by Booth American Company to our people.

In addition to providing a source of revenue by way of licensing fees to the community, the new service will provide broader, much more complete television coverage of news, sports, educational and other programs of interest to television viewers.

Very truly yours,

/s/ Kenneth E. Heineman
Mayor, Muskegon Heights

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[66]

May 27, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

As Supervisor of Norton Township I believe that the Booth American Company's CATV system will provide a needed television reception service to the area.

On November 23, 1965 a license was issued to Booth American Company to operate a CATV system in Norton Township. This not only will provide additional revenue but will afford a much broader coverage of the TV programs on the air today.

Very truly yours,

/s/ Robert K. Hunter
Supervisor, Norton Township

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[67]

May 27, 1966

Mr. Ben F. Waple
Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

As Mayor of Roosevelt Park, I approve of the Cable Television service instituted by Booth American Company.

Booth American Company was licensed to operate a Cable Television service in Roosevelt Park on February 25, 1966. This new service will provide the residents of the area with an opportunity to increase the number of television channels they can view on their television sets, give them better reception of several stations and by doing so, provide revenue by way of license fees to our community.

Very truly yours,

/s/ Dean Recknagel
Mayor, Roosevelt Park

[68]

[68]

BOOTH AMERICAN COMPANY - EXHIBIT 5

STATEMENT OF MUSKEGON TELECASTING COMPANY, INC. APPLICANT FOR A NEW UHF STATION AT MUSKEGON, MICHIGAN, IN SUPPORT OF THE BOOTH CATV SYSTEM AND PETITION FOR WAIVER

[69]

MUSKEGON TELECASTING COMPANY, INC.
387 W. Western Ave.
Muskegon, Michigan

May 26, 1966

Mr. Ben F. Waple, Secretary
Federal Communications Commission
Washington, D. C.

Dear Mr. Waple:

Muskegon Telecasting Company, Inc. has filed with the Federal Communications Commission an application for a new UHF television station to operate on Channel 54 in Muskegon, Michigan.

We have been informed that a proceeding is pending before the Commission relating to the CATV service offered by Booth American Company to the Greater Muskegon Area of Michigan. We have also been informed that Booth intends to file a Petition for Waiver of the Commission's Rule governing the extension of television signals beyond their Grade B contour into the top hundred markets.

Muskegon Telecasting Company, Inc. fully supports and approves the Booth American Company CATV service in the Greater Muskegon Area. We believe that the CATV system will aid the development of the proposed new UHF station. Since there are presently a limited number of television sets in the area capable of receiving UHF signals, the CATV system, which will carry the UHF station, will provide a means for the proposed new UHF station to immediately reach the homes connected with the CATV system.

~~We also endorse the Petition for Waiver so that the CATV system can extend signals of television services beyond their Grade B contours. We understand that this service is necessary in order for the CATV system to survive in this area.~~ We, therefore, support Booth's CATV operation so that they can successfully operate and carry the signal of the proposed UHF station in Muskegon.

Very truly yours,

MUSKEGON TELECASTING
COMPANY, Inc.
/s/ K. J. Yonker
President

KJY:lv

BOOTH AMERICAN COMPANY - EXHIBIT 6

ENGINEERING STATEMENT PREPARED BY E. H. CLARK

[71]

AFFIDAVIT

COUNTY OF WAYNE)
) SS
STATE OF MICHIGAN)

Edward H. Clark, having been duly sworn, deposes and says that:

1. He is a qualified engineer and an officer of Booth American Company, and his qualifications are a matter of record with the Federal Communications Commission.

2. He has prepared the attached exhibits and engineering statement in support of Booth American Company's request for waiver of Section 74.1107 of Commission's Rules, Commission's C.A.T.V. Second Report and Order, with respect to the operations of the Muskegon Television System, a C.A.T.V. division of Booth American Company.

3. He has prepared or caused to be prepared under his immediate supervision the attached exhibits and statement in support thereof.

4. The foregoing statements and the afore-mentioned exhibits, which are attached to and form part of this report, are true and correct of his own knowledge except such statements as are on information and belief, and as to such statements, he believes them to be true.

/s/ Edward H. Clark

[JURAT the 27th day of May, 1966]

[72]

IN RE: Booth American Company's request for waiver of C.A.T.V. Rule 74.1107, to import distant T.V. signals to Greater Muskegon area.

ENGINEERING STATEMENT

The Muskegon Television System is a C.A.T.V. operating division of Booth American Company. (Booth Broadcasting Company — application for change of name file nos. BML-6162 and BMLH-243.)

The Muskegon Television System operates a C.A.T.V. system in the Greater Muskegon Area, Muskegon, Michigan.

The Greater Muskegon Area consists of an urbanized area of four cities and three townships — Cities of Muskegon, North Muskegon, Muskegon Heights, Roosevelt Park and the Townships of Norton, Muskegon, and Laketon, all in Muskegon County. The total 1960 U.S. Census population of this group if 107,793 persons, approximately 32,664 households. Using the A.R.B. published figure of 97% for t.v. homes in Muskegon County indicates ~~31,654~~ [31,684] t.v. homes in the Greater Muskegon Area.[1/]

~~The engineering data supplied herein is based upon Mr. Clark's observations when Booth was studying the need for a t.v. source in the Muskegon area. It is also based on Mr. Clark's study of the nature of the terrain lying between Stations WOOD-TV and WKZO-TV in the direction of the Muskegon area. Examination of the license files for these stations and the engineering data submitted by these stations together with the appropriate topographic maps show that along the pertinent radials, elevations exist beyond the two- to ten-mile range-~~

[1/] These figures exclude Laketon.

~~which would reduce the predicted signal intensity in the Muskegon area. While Mr. Clark has not made a detailed shadow loss study, it is apparent from inspection of the topographic maps that a satisfactory signal intensity would not be expected in a substantial number of locations in the Muskegon area.~~

Television reception in the greater Muskegon area is generally poor, with the exception of one Grade "A" signal (WZZM - Grand Rapids Channel 13 - ABC). Two Grade "B" signals cover the greater Muskegon area (WKZO-TV - Kalamazoo Channel 3 - CBS and WOOD-TV - Grand Rapids Channel 8 - NBC). More than 50% of the t.v. homes receive poor pictures from one or both of the Grade "B" stations. Reception of color t.v. programs from the Grade "B" stations is unsatisfactory in more than 60% of the t.v. homes. More than 50% of the t.v. homes employ tall antenna towers, rotors and high gain antennas and receive fringe signals from the Milwaukee, Wisconsin television stations, and occasionally viewable pictures from some of the Chicago, Illinois television stations.

The C.A.T.V. system for greater Muskegon is designed as a single system to provide distortionless t.v. signals via cable to the entire area. One head end is employed to feed the trunk cable. Map, Exhibit No. 1, shows the location of the head end and all areas to be eventually cabled. Map, Exhibit No. 2, shows the extent of trunk cabling as of April 20, 1966.

[74]

The plan for the total area calls for 403 miles of cable, serving a total of 23,000 t.v. households, to be completed by April 1, 1969.

The present state of completion of the system is approximately 60 miles of cable serving approximately 4,600 t.v. households in North Muskegon and the City of Muskegon.

As an Officer of Booth American Company, and concerned with the C.A.T.V. business operations, I take the liberty to insert a business projection into this engineering statement, as follows:

The anticipated number of attached subscribers at the end of five years in greater Muskegon is projected as 50% of the potential number of t.v. homes covered, or 11,500 (based on a study of existing C.A.T.V. system).

The anticipated number of attached subscribers at the end of the first year of operation is projected as 2,400 (approximately 20% of potential).

The purpose of inserting the above figures is to show a comparison of C.A.T.V. homes vs. the T.V. Homes to be covered by a proposed new Grand Rapids UHF (Channel 17) television station.

[75]

	U. S. Census 1960 — Pop.	1960 Census Est. Households	1960 Census Est. T. V. Households
Proposed G.R. UHF Ch. 17 Grade "B"	718,810	217,851	211,309
Greater Muskegon Total area	107,793	32,664	31,684 ~~31,654~~
Greater Muskegon CATV total cable	78,210	23,700	23,000
Projected 5th year CATV Subscribers			11,500
Projected 1st year CATV Subscribers			2,400

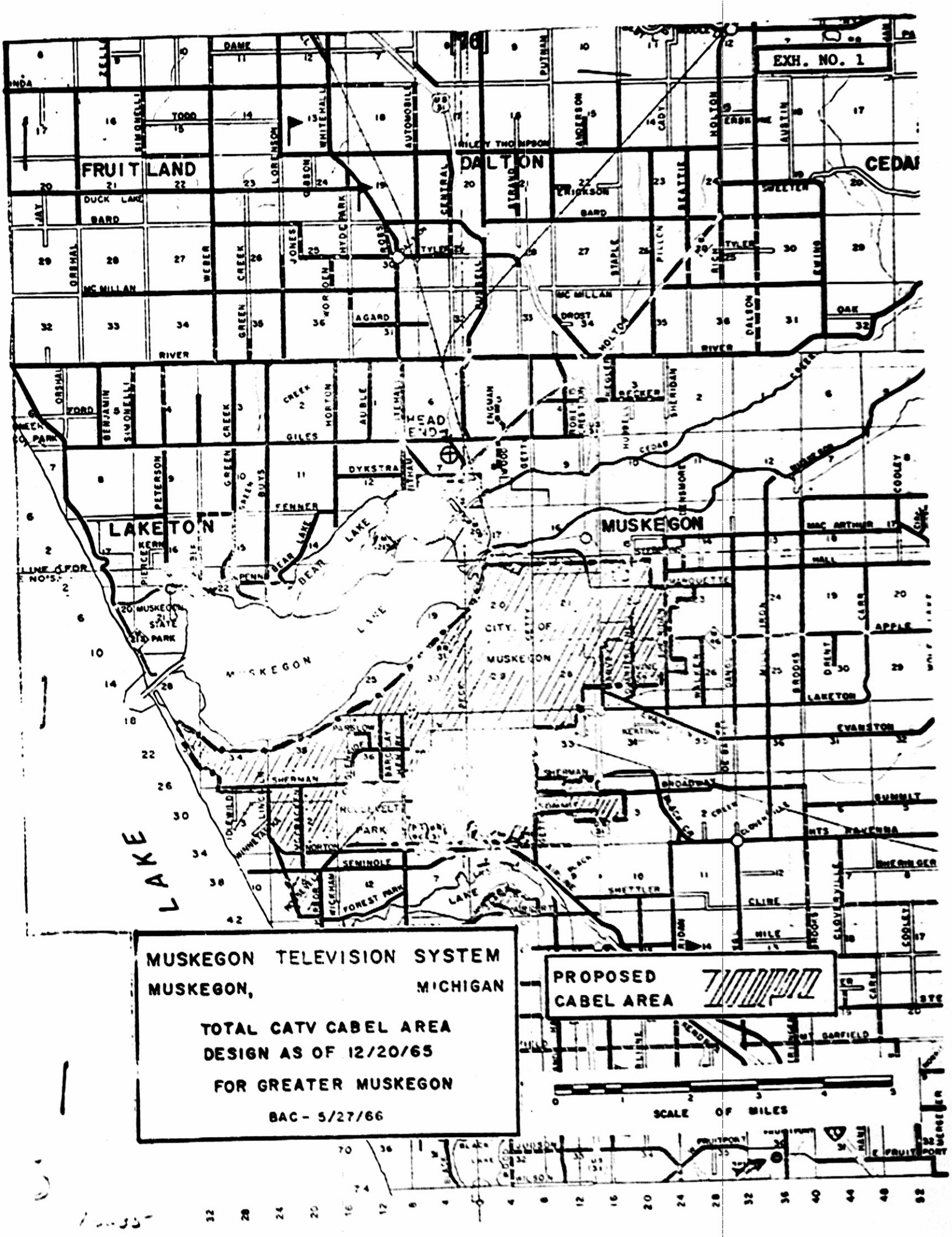
The total C.A.T.V. potential (100%) includes only 10.9% of the t.v. homes within the Grade "B" of the proposed UHF Channel 17 - Grand Rapids. The projected number of subscribers at the end of the fifth year for the Greater Muskegon C.A.T.V. System represents only 5.4% of the proposed UHF Channel 17 Grade "B" homes, while the anticipated first year C.A.T.V. subscribers represent only 1.1% of the UHF Channel 17 Grade "B" homes.

May 27, 1966

/s/ Edward H. Clark

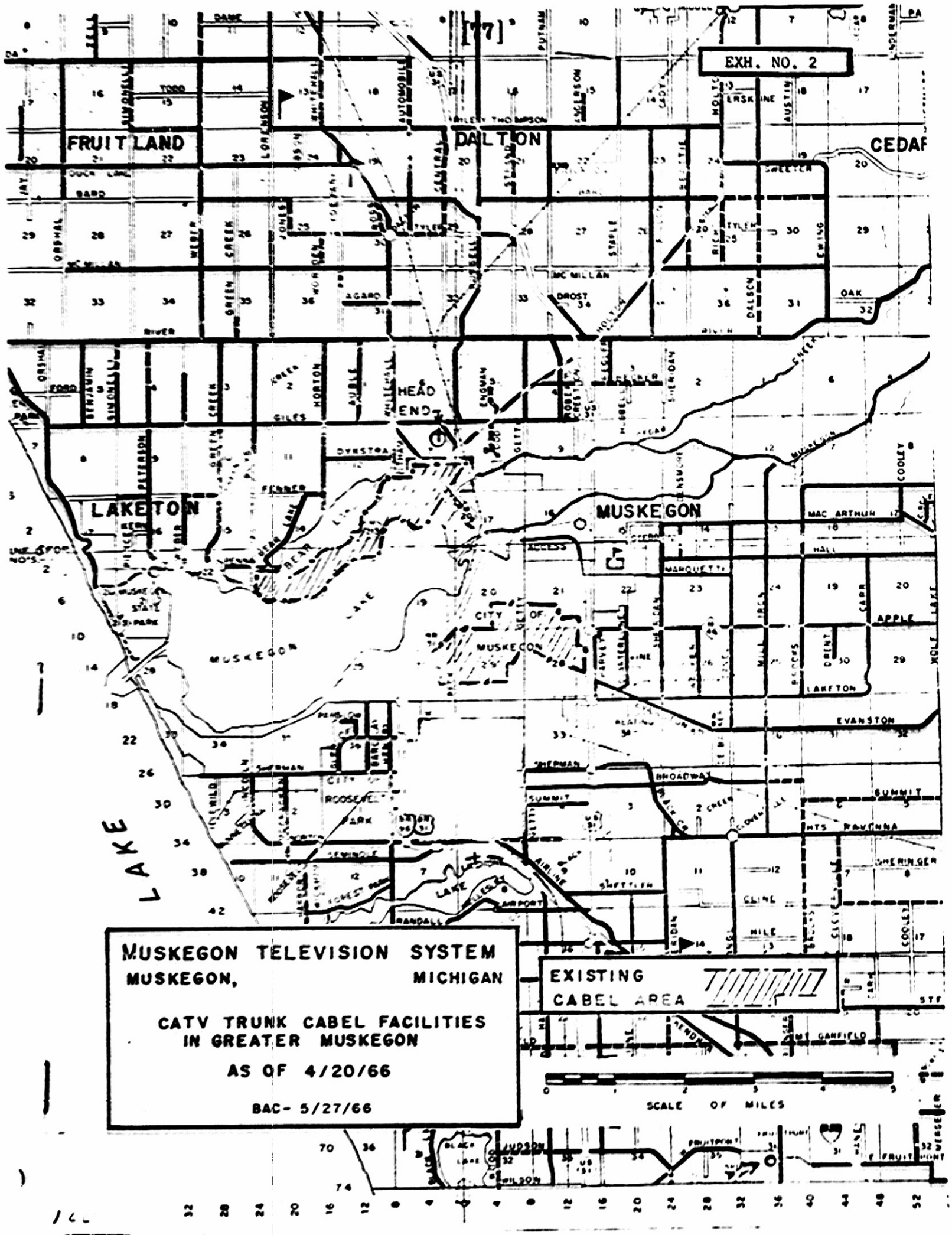
[76]

EXH. NO. 1


FRUIT LAND
DALTON
LAKETON
MUSKEGON
HEAD
LAKE
MUSKEGON
CITY OF MUSKEGON
LAKE
DUCK LAKE
BEAR LAKE
BEAR LAKE
MUSKEGON TELEVISION SYSTEM
MUSKEGON, MICHIGAN
TOTAL CATV CABEL AREA
DESIGN AS OF 12/20/65
FOR GREATER MUSKEGON
BAC - 5/27/66
PROPOSED
CABEL AREA
SCALE OF MILES

[77]

EXH. NO. 2



MUSKEGON TELEVISION SYSTEM
MUSKEGON, MICHIGAN

CATV TRUNK CABEL FACILITIES
IN GREATER MUSKEGON

AS OF 4/20/66

BAC- 5/27/66

BOOTH AMERICAN COMPANY - EXHIBIT 8

FINANCIAL EXPENDITURES AND COMMITMENTS OF BOOTH AMERICAN COMPANY

[81]

BOOTH AMERICAN COMPANY
Operating Divisions:
Booth Communications Company
Booth Broadcasting Company
2300 Buhl Building
Detroit, Michigan
48226

FINANCIAL EXPENDITURES AND COMMITMENTS BOOTH AMERICAN COMPANY BETWEEN DECEMBER 10, 1964 AND APRIL 30, 1966 FOR CATV IN GREATER MUSKEGON, MICHIGAN

I. SUMMARY OF ACTUAL CASH EXPENDITURES PRIOR TO FEBRUARY 15, 1966:

1.	Land	$ 5,219.50
2.	Land improvement	1,070.00
3.	Head End building	1,180.00
4.	Technical equipment & supplies	22,851.87
5.	Tower and TV Antenna	17,157.86
6.	Furniture and fixtures	1,085.63
7.	Leasehold improvement (office)	4,146.50
8.	Installation — Service trucks	7,418.40
9.	Miscellaneous expenditures for Engineering, Legal services, Operational expense.	31,419.85
10.	Expense total prior to February 15, 1966.	91,549.61

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[82]

II. SUMMARY OF FINANCIAL OBLIGATIONS UNDERTAKEN BY BOOTH AMERICAN COMPANY PRIOR TO FEBRUARY 15, 1966:

11.	General Telephone Company cancellation charge — CATV Cable constructed and in place in Muskegon and North Muskegon as per Tariff M.P.S.C. No. 13	$115,200.00
12.	Balance lease on office 10 years @ $1,200.00 per year.	11,850.00
13.	Total obligations prior to February 15, 1966.	127,050.00
14.	Total obligations and cash expenditures prior to February 15, 1966.	218,599.61

III. SUMMARY OF CASH EXPENDITURES FEBRUARY 16, TO APRIL 30, 1966:

15.	February 16 to March 31, 1966 CATV operational expense.	15,342.65
16.	March 31, 1966 to April 30, 1966, CATV operational expense.	16,175.74
17.	Total February 16 to April 30, 1966.	31,518.39

[83]

IV. SUMMARY OF FINANCIAL COMMITMENTS WHICH BOOTH AMERICAN COMPANY IS OBLIGATED TO FULFILL:

18.	Five year contract with General Telephone Company of Michigan for Greater Muskegon to lease 403 miles of CATV cable at $768.00 per mile per year. 1/	$1,547,520.00
19.	Grand total expended and committed.	$1,797,638.00

Note: Money expended and commitments made are for the Greater Muskegon Area which includes the Municipalities of Muskegon, North Muskegon, Muskegon Heights, Roosevelt Park, Norton Township, and Muskegon Township, Michigan.

1/ This contract was entered into prior to February 15, 1966.

BOOTH AMERICAN COMPANY - EXHIBIT 9

FEDERAL COMMUNICATIONS COMMISSION

[SEAL]

79927

PUBLIC NOTICE - G

WASHINGTON, D. C. 20554

February 15, 1966

FCC ANNOUNCES PLAN FOR REGULATION OF ALL CATV SYSTEMS

Following meetings held February 10, 11, and 14, the Commission has reached agreement on a broad plan for the regulation of community antenna television systems, including a legislative program. To insure the effective integration of CATV with a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses, and those which receive their signal off the air. Excluded from these rules will be those CATV systems which serve less than fifty customers, or which serve only as an apartment house master antenna. The CATV rules concurrently in effect for microwave-fed systems will be revised to reflect the new rules adopted for all systems.

Coupled with the new CATV rules, to be incorporated in a Report and Order shortly to be issued, the Commission will send recommended legislation to Congress to codify and supplement its regulatory program in this important area.

The Commission's new CATV program includes eight major points:

(1) Carriage of local stations. A CATV system will be required to carry without material degradation the signals of all local television stations within whose Grade B contours the CATV system is located. The

carriage requirements thus made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's First Report and Order in Dockets 14895 and 15233, adopted in April, 1965.

(2) Same day non-duplication. A CATV system will be required to avoid duplication of the programs of local television stations during the same day that such programs are broadcast by the local stations. This non-duplication protection, as under the existing rules, will apply to "prime-time" network programs only if such programs are presented by the local station entirely within what is locally considered to be "prime-time." It will also give the CATV subscribers access to network programs on the same day that they are presented on the network. Non-duplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system.

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The new non-duplication rules thus embody two substantial changes from those adopted in the First Report and Order. First, the time period during which non-duplication protection must be afforded has been reduced from fifteen days before and after local broadcast to the single day of local broadcast. Second, a new exemption from the non-duplication requirement has been added as to color programs not carried in color by local stations.

(3) Private agreements and ad hoc procedures. The Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. Moreover, the Commission will give ad hoc consideration to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules.

(4) Distant City Signals -- New CATV systems in the top 100 television markets. Parties who obtain state or local franchises to operate CATV systems in the 100 highest ranked television markets (according to American Research Bureau (ARB) net weekly circulation figures), which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be required to obtain FCC approval before CATV service to subscribers may be commenced. This aspect of the Commission's decision is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966.

An evidentiary hearing will be held as to all such requests for FCC approval, subject, of course, to the general waiver provisions of the Commission's rules. These hearings will be concerned primarily with (a) the potential effects of the proposed CATV operation on the full development of off-the-air television outlets (particularly UHF) for that market, and (b) the relationship, if any, of proposed CATV operations and the development of pay television in that market. The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market.

Service presently being rendered to CATV subscribers will be unaffected. However, the Commission will entertain petitions objecting to the geographical extension to new areas of CATV systems already in operation in the top 100 television markets.

(5) Distant City Signals -- New CATV systems in smaller television markets. The Commission's prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings. However, the Commission will entertain, on an ad hoc basis, petitions from interested parties concerning the carriage of distant signals by CATV systems located in such smaller markets.

(6) Information to be filed by CATV owners. Pursuant to its authority under Section 403 of the Communications Act, the Commission will, within an appropriate time to be prescribed, require all CATV operations to submit the following data with respect to each of their CATV systems: (a) the names, addresses and business interests of all officers, directors, and persons having substantial ownership interests in each system; (b) the number of subscribers to each system; (c) the television stations carried on each system; and (d) the extent of any existing or proposed program origination by each CATV system.

(7) Assertion of jurisdiction. To the extent necessary to carry out the regulatory program set forth above, the Commission asserts its present jurisdiction over all CATV systems, whether or not served by microwave relay.

(8) Legislation to be recommended to Congress. The Commission will recommend, with specific proposals where appropriate, that Congress consider and enact legislation designed to express basic national policy in the CATV field. Such legislation would include those matters over which the Commission has exercised its jurisdiction, as well as those matters which are still under consideration.

Included in these recommendations will be the following:

(a) Clarification and confirmation of FCC jurisdiction over CATV systems generally, along with such specific provisions as are deemed appropriate.

(b) Prohibition of the origination of program or other material by a CATV system with such limitations or exceptions, if any, as are deemed appropriate.

(c) Consideration of whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system.

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(d) Consideration of whether CATV systems should or should not be deemed public utilities. In this connection, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The Commission, of course, stands ready to discuss all of the above matters with the appropriate Congressional committees at any time.

- FCC -

Attachments

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BROADCAST BUREAU EXHIBIT 1

STIPULATION

It is stipulated by and between the parties to this proceeding as follows:

Respondent, Booth American Company (hereinafter referred to as Booth), is doing business in the Greater Muskegon Area under the name of Muskegon Television System. Muskegon Television System is an operating division of Booth, and not a separate corporate entity.

Booth received a franchise and licenses to construct and operate a CATV system in the cities and townships listed below on the following dates:

North Muskegon	Franchise 25 years	August 23, 1965
Muskegon	License (indefinite)	September 7, 1965
Muskegon Township	License (indefinite)	November 17, 1965
Muskegon Heights	License (indefinite)	December 20, 1965
Norton Township	License (indefinite)	November 23, 1965
Roosevelt Park	License (indefinite)	February 25, 1966

[95]

CATV service was first begun in North Muskegon on March 4, 1966 and there were approximately 124 subscribers receiving service by March 17, 1966. CATV service was first commenced in Muskegon on April 15, 1966.

As of May 26, 1966 there were 357 subscribers (250 in North Muskegon and 107 in Muskegon) receiving the CATV service. The television stations carried on the CATV system when service started in North Muskegon and Muskegon as well as those presently being carried on the CATV system are as follows:

Stations Within Whose Predicted Grade A Contours North Muskegon and Muskegon Are Located (1)

Stations WZZM-TV, Grand Rapids, Michigan (Channel 13)

Stations Within Whose Predicted Grade B Contours North Muskegon and Muskegon Are Located (2)

Station WKZO-TV, Kalamazoo, Michigan (Channel 3)
Station WOOD-TV, Grand Rapids, Michigan (Channel 8)

Stations Within Whose Predicted Grade B Contours North Muskegon and Muskegon are Partially Located (1) 1/

Station WWTV, Cadillac, Michigan (Channel 9)

Stations Beyond Whose Predicted Grade B Contours North Muskegon and Muskegon are located (5)

Station WTMJ-TV, Milwaukee, Wisconsin (Channel 4)
Station WMAQ-TV, Chicago, Illinois (Channel 5)
Station WITI-TV, Milwaukee, Wisconsin (Channel 6)
Station WMVS-TV, Milwaukee, Wisconsin (Channel 10)
Station WISN-TV, Milwaukee, Wisconsin (Channel 12)

Grand Rapids-Kalamazoo is ranked by the American Research Bureau as the 38th largest television market based on net weekly circulation figures for 1965. North Muskegon and Muskegon are located within the [predicted] Grade

1/ The predicted Grade B coverage contour of Station WWTV covers only a very small portion of North Muskegon and Muskegon.

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A contour of one of the three television stations located in the Grand Rapids-Kalamazoo television market (Station WZZM, Channel 13, Grand Rapids).

The total population of the Greater Muskegon Area, according to the 1960 Census, is 111,937. The population is broken down as follows: Muskegon: 46,485; Muskegon Heights: 19,552; North Muskegon: 3,855; Roosevelt Park: 2,578; Muskegon Township: 17,537; Norton Township: 17,816; Laketon Township: 4,114.2/

2/ Booth has made application for a license in Laketon Township but it has not been acted on to date.

Respectfully submitted

By /s/ Paul Dobin
Counsel for Booth American Company

By /s/ Joseph Chachkin
Counsel for the Broadcast Bureau

[203]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 66-625
86415

In the Matter of	)	
	)	
Cease and Desist Order to be directed	)	
against BOOTH AMERICAN COMPANY,	)	DOCKET NO. 16635
owner and operator of community antenna	)	
television systems at North Muskegon	)	
and Muskegon, Michigan 1/	)	

Appearances

Paul Dobin, Stanley Neustadt and Ronald A. Siegel (Cohn & Marks) on behalf of Booth American Company; and Joseph Chachkin, on behalf of the Broadcast Bureau.

DECISION

Commissioner Wadsworth for the Commission: Chairman Hyde concurring and issuing a statement; Commissioner Bartley dissenting and issuing a statement in which Commissioner Loevinger joins; Commissioner Johnson absent.

1. By an Order to Show Cause, FCC 66-419, 3 F.C.C. 2d 713, released May 13, 1966, the Commission directed that Muskegon Television System and Booth Communications Company, operating divisions of Booth American Company (hereinafter Booth or respondent) show cause why they should not be ordered to cease and desist from further operation of community antenna television systems (CATV) in North Muskegon and Muskegon, Michigan, in violation of Section 74.1107 of the Commission's Rules. Inasmuch as the Commission found that expeditious action in this matter was necessary, it directed that immediately after closing

1/ The Order to Show Cause was issued to Muskegon Television System and Booth Communications Company. However, at the hearing, respondent's attorney advised the Commission that Booth American Company is the only corporate entity and the only respondent, and that the named parties in the Order to Show Cause are merely operating divisions of Booth American Company. Although a written appearance was filed on behalf of the companies named in the Order to Show Cause, appearances at the prehearing conference and at the hearing were made on behalf of Booth American Company. Also, the Order to Show Cause was directed to alleged CATV operations in Muskegon Township, Muskegon Heights, Norton Township, or Roosevelt Park, Michigan; but since CATV service is not now being provided and it is not contemplated in the immediate future by the respondent to these communities, the question of issuing a cease and desist order directed to operations in any of them is rendered moot.

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the record it be certified to the Commission for final decision. The Commission further ordered that, within seven calendar days after the date that the record is closed, the parties file their proposed findings of fact and conclusions of law.

2. A prehearing conference was held before Hearing Examiner Walther W. Guenther on June 6, 1966, the evidentiary hearing was held on June 16 and 17, 1966, and the record was closed on the latter date. As directed by the Order to Show Cause, the Hearing Examiner certified the record to the Commission by Order, FCC 66M-879, released June 21, 1966. Proposed findings of fact and conclusions of law were filed on June 24, 1966, by the respondent, and by the Broadcast Bureau.

3. Rules governing the regulation of all CATV systems 2/ were adopted by the Commission's Second Report and Order in Docket Nos. 14895, 15233 and 15971, 2 F.C.C. 2d 725, released March 8, 1966; and these rules were published in the Federal Register on March 17, 1966 (31 F.R. 4540). Section 74.1107, which is the basis for the charges in the Order to Show Cause issued in this proceeding, was made effective immediately upon publication. The portions of that Section pertinent to this proceeding provide as follows:

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"(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

2/ Section 74.1101(a) defines a CATV system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Booth concedes that its operations in North Muskegon and Muskegon are CATV systems as defined by this rule.

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"(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was

obtained, the signal or signals proposed to be extended beyond their grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within 30 days after such public notice. A reply to such responses or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

* * *

"(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; . . . ."

4. The basic facts in this case going to the violation of Section 74.1107 of the Rules have been stipulated by the parties. Booth has received authorization from each of six communities, which are located in what is known as the Greater Muskegon Area, to construct and operate a CATV system. At present, however, Booth is rendering service to only two of these communities: North Muskegon, for which it received a 25-year franchise on August 23, 1965, and Muskegon, for which it was granted an indefinite license on September 7, 1965. Agreements with the General Telephone Company of Michigan to supply distribution cable for North Muskegon and for Muskegon were signed on August 25, 1965. The installation of trunk and distribution cable was completed in North Muskegon by January 14, 1966 and in a portion of Muskegon by March 3, 1966. CATV service to North Muskegon did not begin until March 4,

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1966, and by March 17 there were 124 subscribers receiving service. CATV operations in Muskegon were begun on April 15, 1966. As of May 26, 1966, Booth was serving 250 subscribers in North Muskegon and 107 subscribers in Muskegon.

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5. Each CATV system distributes to its subscribers the signals of the following nine television stations:

WKZO-TV (Channel (3)	Kalamazoo, Michigan
WOOD-TV (Channel 8)	Grand Rapids, Michigan
WZZM-TV (Channel 13)	Grand Rapids, Michigan
WWTV (Channel 9)	Cadillac, Michigan
WMAQ-TV (Channel 5)	Chicago, Illinois
WTMJ-TV (Channel 4)	Milwaukee, Wisconsin
WITI-TV (Channel 6)	Milwaukee, Wisconsin
WMVS (Channel 10)	Milwaukee, Wisconsin
WISN-TV (Channel 12)	Milwaukee, Wisconsin

6. All of the above television stations have been carried by the North Muskegon and Muskegon CATV systems since the commencement of service to their respective communities, and both communities are within the predicted Grade A contour of the Grand Rapids Channel 13 station, WZZM-TV. Grand Rapids-Kalamazoo is rated by the American Research Bureau as the 38th largest television market based on net weekly circulation figures for 1965.[3/] Each CATV system therefore comes within the provisions of Section 74.1107 as one "operating within the predicted Grade A contour of a television broadcast station in the 100 largest markets" and which may not extend the signal of a television station beyond that station's Grade B contour without Commission approval. No violation of the rules results from the distribution on either CATV system of the signals of any of the Michigan television stations. The predicted Grade A contour of WZZM-TV and the predicted Grade B contours of WOOD-TV and WKZO-TV include all of North Muskegon and Muskegon, and the predicted Grade B contour of WWTV penetrates a portion of each community. Under the rules, carriage of

all of the foregoing Michigan television stations by the CATV system is permissible. Buckeye Cablevision, Inc., FCC 66-449, 3 F.C.C. 2d 798, released May 27, 1966; Mission Cable TV, Inc. and Trans-Video Corp., FCC 66-548, released June 22, 1966.

7. North Muskegon and Muskegon lie beyond the Grade B contours of the one Chicago and four Milwaukee stations listed above. The predicted Grade B contours of these stations fall short of reaching North Muskegon and Muskegon by the following distances:

WITI-TV	9 miles
WTMJ-TV	10 miles
WISN-TV	18 miles
WMVS	22 miles
WMAQ-TV	49 miles

3/ ARB treats the Grand Rapids-Kalamazoo area as a single television market.

8. Before commencing operation in the two communities, Booth at no time requested permission to extend the signals of the Chicago and Milwaukee stations nor has such permission been granted by the Commission. Since service was instituted after February 15, 1966, such permission was required under Section 74.1107. Thus, the record establishes that the signals of five television stations are being extended beyond their Grade B contours in violation of the provisions of Section 74.1107 of the Rules. The only issue presented here is whether the foregoing facts require the issuance of an order directing Booth to cease and desist from further operation of its CATV systems in violation of the rules.

9. Booth questions the validity of this proceeding, claiming that the Commission has no jurisdiction over CATV systems, that our Rules pertaining thereto are invalid, and that the expedited hearing procedure is contrary to the Administrative Procedure Act. As to jurisdiction,

and the validity of our Rules, our position was set forth in the Second Report and Order (2 F.C.C. 2d at 729-734, 793-797). We adhere to our previous position and no amplification is necessary. Similarly, with respect to the expedited hearing procedure, our reasons therefor and the basis of our authority are detailed in Buckeye Cablevision, Inc., 3 F.C.C. 2d at 801-803.[4/] Moreover, the necessity for such procedure is further supported by the rapid growth of Booth's North Muskegon system from 124 subscribers on March 17, 1966 to 250 subscribers on May 26, 1966,[5/] and by Booth's conduct in commencing a new CATV service at Muskegon on April 15, 1966, more than a month after the release of the Second Report and Order. Thus, as stated in Buckeye Cablevision, Inc., supra, at par. 10:

> ". . . . We . . . [cannot] permit this case to go through the regular hearing process of initial decision and exceptions prior to Commission review and accomplish our objective of preventing a cable system carrying distant signals from becoming 'established or well entrenched' before taking effective action. . . ."

[4/] The thirty day period provided by 47 U.S.C. 312(c) for preparation for hearing was waived by Booth (Tr. 66). In view of the foregoing, its belated claim, advanced for the first time in its proposed findings and conclusions, that it had insufficient time to prepare for hearing may not be entertained.

[5/] We also note that by May 26, 1966, Booth had accepted 222 applications for service in North Muskegon and 501 applications for service in Muskegon.

10. It is further argued by Booth that, even assuming the validity of the rules, Section 74.1107 may not be validly applied to its North Muskegon and Muskegon CATV operations because it was misled by the Commission into believing that prior Commission approval for carriage

of the distant stations was unnecessary. The basis for this contention lies in that portion of our Public Notice of February 15, 1966 (Mimeo No. 79927), announcing plans for the regulation of all CATV systems, wherein we stated:

> "The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market." (emphasis supplied)

Since the two communities involved herein are not within the Grade A contours of all Grand Rapids-Kalamazoo stations, but of only one such station (WZZM-TV), Booth states that it concluded that it was not subject to the hearing requirement of Section 74.1107, and thus CATV service in North Muskegon was instituted on March 4, 1966. Booth asserts that it did not become aware of the difference between the wording of the hearing requirement in the Public Notice and that in Section 74.1107(a)[6/] until after the release on March 8, 1966 of the Second Report and Order.[7/] In view of the foregoing, Booth claims that it is entitled to continue carriage of the distant stations on both CATV systems.

11. Initially, we note that since North Muskegon and Muskegon are incorporated municipalities with legally defined boundaries, the CATV system in each municipality must be regarded as a separate and distinct operation even though both systems are served from the same headend. Telerama, Inc., 3 F.C.C. 2d 585, dated April 29, 1966. Consequently, the permissible extension of a station's signal beyond that station's Grade B contour into one community would not justify the extension of that station's signal into the other.[8/] In this connection,

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[6/] The Rule refers to CATV systems "operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets."

[7/] A copy of the Commission's Public Notice of March 8, 1966 (Mimeo No. 80850) summarizing the CATV rules was mailed on March 9, 1966 by Booth's Washington counsel to Mr. Clark, Booth's vice president.

8/ Respondent further argues that the Greater Muskegon Area should be considered as a single geographical area for the purpose of Section 74.1107 so that if carriage of the distant stations is found to be permissible in North Muskegon, a community with a population of 3,855, such carriage must be permitted in all six governmental entities of the Greater Muskegon Area in which it has received authorization to operate CATV systems with a total population of 107,823. The construction of Section 74.1107 urged by respondent would tend to defeat the important public interest objectives sought to be accomplished thereby, and must, therefore, be rejected. Mission Cable TV, Inc. and Trans-Video Corp., FCC 66-548, released June 22, 1966.

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we note that operations were not commenced in Muskegon until April 15, 1966, more than a month after Booth had learned that the hearing requirement of Section 74.1107 applied to its CATV operations. Therefore, whatever the merit to Booth's contention on the ground of mistake, that contention cannot be used with respect to the Muskegon operation.

12. We must also reject as without merit Booth's contention that it is entitled to continue carrying the distant stations on its North Muskegon cable system, where operations were commenced on March 4, 1966. The purpose and effect of our February 15, 1966, Public Notice were discussed and explained in cur Memorandum Opinion and Order in Docket Nos. 14895, 15233 and 15971, FCC 66-456, 3 F.C.C. 2d 816 at 819-823 (pars. 12-20), released May 27, 1966, denying petitions for stay of our Second Report and Order. In pertinent part we therein stated the following (par. 19):

> ". . . That Notice did not constitute Commission action and did not require any action or course of conduct by CATV systems. It simply announced, inter alia, the grandfathering date that had been decided upon in the Commission deliberations and which was to be incorporated in the regulations which were still to be issued. . . ."

13. In any event we find no equities in favor of Booth which merit special consideration. Since April 23, 1965, when we released our

Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971 (1 F.C.C. 2d 453), Booth has been on notice that the Commission had under consideration the assertion of jurisdiction over non-microwave, as well as microwave, CATV systems and the imposition of restrictions upon the distance that television signals could lawfully be extended by such cable systems. In fact, the Commission had before it a more far-reaching proposal than that which was finally adopted. Booth concedes that it was aware of the contents of this Notice, but it nevertheless proceeded with its plans to construct and operate the CATV systems here in question. (See Memorandum Opinion and Order in Docket Nos. 14895, 15233 and 15971, supra, 3 F.C.C. 2d at 823-826). According to the evidence submitted by Booth, the bulk of its expenditures and its principal contractual

obligations in connection with the construction of the North Muskegon and Muskegon cable systems were incurred prior to February 15, 1966, and with respect to such expenditures it is in the same position as any other CATV owner who was proceeding with his plans and construction as of February 15, 1966. Certainly, these commitments were not made in reliance upon any notice issued by the Commission. Insofar as the February 15, 1966, Public Notice is concerned, the announcement was intended to emphasize the all-inclusive application of the proposed rule, i.e., to each and every CATV system operating within the Grade A contour of each and every television station located in one of the 100 highest ranked television markets. Although respondent could hardly have failed to realize that this was a possible, if not probable, construction to be placed on the words used in the Notice, it nevertheless made no effort to ascertain from either the Commission or from the experienced communications counsel by which it was then represented whether it could legally proceed with its plans to carry the distant stations before obtaining Commission approval. Furthermore, the

respondent has continued to expand its system after the rule itself was adopted, at which time it could no longer rely upon any ambiguity or mistake in the Notice. It has done so without coming to the Commission until June 10, 1966, with any request for a waiver based upon a claim of misunderstanding or being misled by the Commission. Finally, respondent was not required under the rules to cease all operations but only to remove, on and after March 17, 1966, those signals which come within the interdiction of Section 74.1107.

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14. Relying upon C. J. Community Services, Inc. v. Federal Communications Commission, 100 U.S. App. D.C. 379, 246 F.2d 660 (1957) and Section 1.91(e) of the Rules [9/], respondent argues that even though a violation of the rules is established, the Commission must determine on the basis of the facts and circumstances of this case whether it should, in the exercise of its discretion, issue a cease and desist order. In support of this contention respondent introduced into evidence, over the objections of the Broadcast Bureau, information concerning: (1) the past record of performance of Booth as a licensee of the Commission; (2) its expenditures and commitments in connection with the construction and operation of the CATV systems; (3) its commitments to the people of North Muskegon and Muskegon, and the need for CATV service; and (4) the situation with respect to present and prospective UHF operations in the area. To a large extent, the same data were submitted in support of Booth's application for a waiver of Section 74.1107(a) [10/] and Booth concedes that the Commission is not required to dispose of that application in this show cause proceeding. Booth insists, however, that the Commission must consider this evidence in order to determine whether a cease and desist order should be withheld until disposition is made of the pending application for waiver. For the reasons set forth below, we conclude that such evidence is irrelevant in this proceeding and should have been excluded.

15. The decision of the U.S. Court of Appeals in C. J. Community is inapposite here. In that case, it appeared that there was no "administrative mechanism through which a license may be procured" for the operation of the booster which was the subject of that proceeding, and the Court held that the "Commission acted mistakenly in its belief that it lacked discretion to withhold the issuance of a cease and desist order" once the Commission found a violation to exist. However, no comparable situation is present here since Section 74.1107 specifies the procedure to be followed in order to obtain Commission approval for the extension of television signals beyond their Grade B contours. Booth could either have requested the evidentiary hearing required by

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9/ Section 1.91(e) provides as follows:

"Correction of or promise to correct the condition or matters complained of in a show cause order shall not preclude the issuance of a cease and desist order. Corrections or promises to correct the conditions or matters complained of, and the past record of the licensee, may, however, be considered in determining whether a revocation and/or a cease and desist order should be issued."

10/ On June 10, 1966, Booth filed a request (CATV 100-45) pursuant to Section 74.1107(a) for permission to carry the distant stations. See Public Notice of June 16, 1966 (Mimeo No. 85422), Report No. 15.

Section 74.1107 or it could have applied for a waiver of the Rule to permit carriage without an evidentiary hearing, and prompt consideration would have been accorded such an application. The CATV rules have special waiver provisions (Section 74.1109) going beyond the general waiver rules to provide expeditious consideration of waiver requests. Booth did neither but chose, instead, to proceed in violation of the rule and now seeks special consideration while it persists in flouting our rules.

16. Secondly, our determination that a cable system operating in one of the top 100 television markets be in compliance with the rules

before consideration will be given to authorizing the extension of television signals beyond their Grade B contours is not predicated upon the lack of discretion to do otherwise. Rather, our decision is predicated upon the conclusion, reached after thorough and careful consideration of the extensive comments filed in the rulemaking proceeding, that the public interest would be affected adversely by the favorable exercise of discretion which would permit carriage of distant signals before all relevant facts in the particular case have been ascertained. Important questions, such as the economic impact upon the establishment or maintenance of UHF stations and the relationship of CATV operations to the development of pay-TV (2 F.C.C. 2d at 781, par. 139), are presented by the importation of distant signals into the major markets, and unless the status quo is maintained until all public interest considerations bearing on those questions have been fully explored and resolved, we run the risk of a CATV operation which will have serious adverse consequences. As we pointed out in the Second Report and Order (2 F.C.C. 2d at 782, par. 140), our examination of CATV operations must be completed "before they become established or well entrenched" since otherwise "it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." We recognized that some delay in the commencement of CATV service might occur because of the necessity for evidentiary hearings, but we found that the significance of such delay "is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service" (2 F.C.C. 2d at 783, par. 144).[11/] Therefore, we concluded that, on balance, the likelihood of adverse consequences from the proscribed CATV operations outweighed the possible benefits of immediate CATV service. We find no sufficient basis in any of the arguments advanced on behalf of Booth to depart in this case from the policy determinations enunciated in the rulemaking proceeding. It may be to Booth's private financial advantage

11/ In C. J. Community, no off-the-air television reception was available except from the unauthorized booster, whereas North Muskegon and Muskegon are within the predicted Grade A contour of one station, within the predicted Grade B contours of two others, and a portion of each community is within the predicted Grade B contour of a third station. Thus a significant factual distinction exists between C. J. Community and the case under consideration.

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to distribute the signals of the distant television stations to its subscribers without awaiting Commission approval, but we cannot permit such private considerations to override the substantial public interest reasons for requiring compliance by the CATV until action on a waiver application is completed.

17. Section 1.91(e) of the Rules, upon which respondent also relies, provides only that the Commission "may" consider promises of compliance and other mitigating circumstances in deciding whether a cease and desist order should issue; it does not provide that in every instance the Commission "must" consider such promises or mitigating factors. Where, as here, immediate compliance with the rules is essential, the Commission is not precluded from taking whatever action is required in the public interest because of respondent's promises. Furthermore, Booth has made no unconditional commitment to comply, but instead it has agreed to suspend carriage of the distant stations only if the Commission's rule "is held to be lawfully applicable to its operation and if its request for waiver is lawfully rejected." This qualified promise of compliance makes obvious the need for the issuance of a cease and desist order if we are to prevent these CATV systems from becoming "entrenched" while Booth prosecutes its waiver application before the Commission and, if the decision is adverse, its appeal to the Court.

18. We do not believe that we can grant Booth's request that the Commission withhold the issuance of a cease and desist order until disposition is made of the application for waiver. In a similar situation in

Buckeye Cablevision, Inc., 3 F.C.C. 2d 808, released May 27, 1966, we rejected a request for consolidation of the show cause proceeding with action on the waiver application.

19. A request for oral argument before the Commission, en banc, has been submitted by Booth which asserts that the clarification of the issues involved in this proceeding is necessary.[11a/] The pertinent facts herein have been stipulated by the parties and, insofar as the legal issues are concerned, Booth's views have been presented at the evidentiary hearing and in its proposed findings and conclusions of law herein which consist of over 70 pages. Therefore, we conclude that oral argument will serve no useful purpose, and Booth's request will be denied.

20. The record herein establishes that Booth owns and operates CATV systems, as defined by Section 74.1101(a) of the Rules, in North Muskegon and Muskegon, Michigan; and that each system is a separate and distinct operation within the contemplation of Section

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11a/ An opposition to the request for oral argument was filed by the Broadcast Bureau on July 7, 1966.

74.1107 and subject to the provisions thereof. The record further establishes that both CATV systems operate within the Grade A contour of a television station in the Grand Rapids-Kalamazoo market, which is the 38th largest television market; that said systems commenced operation after February 15, 1966; that since March 4, 1966, the North Muskegon system, and since April 15, 1966, the Muskegon system have distributed to its subscribers the signals of nine television stations including the signals of one Chicago and four Milwaukee stations; and that the CATV systems have extended the signals of the Chicago and Milwaukee stations beyond their Grade B contours without requesting and obtaining Commission approval. On the basis of the foregoing, we

conclude that Booth is operating its CATV systems in North Muskegon and Muskegon, Michigan, in violation of Section 74.1107 of the Rules and Section 312(b) of the Communications Act of 1934, as amended (47 U.S.C. 312(b)). We further conclude that the public interest requires the issuance of an order requiring Booth to cease and desist promptly from such unlawful operations.[12/]

21. The time table for compliance which was adopted in Buckeye Cablevision, Inc., FCC 66-449, 3 F.C.C. 2d at 806, released May 27, 1966, will be utilized in this proceeding. The respondent must comply with this cease and desist order within two days[13/] after release, unless it notifies the Commission during that two-day period that it intends to seek judicial review of our order; in that event, respondent is afforded an additional 14-day period in which to file its appeal and seek a stay of this order.

22. ACCORDINGLY, IT IS ORDERED, This 13th day of July, 1966, that within two days after the release of this Decision, Booth American Company CEASE AND DESIST from the operation of its community antenna television systems at North Muskegon and Muskegon, Michigan,

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12/ Section 502 of the Communications Act provides as follows:

"Any person who willfully and knowingly violates any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act, or any rule, regulation, restriction, or condition made or imposed by any international radio or wire communications treaty or convention, or regulations annexed thereto, to which the United States is or may hereafter become a party, shall, in addition to any other penalties provided by law, be punished, upon conviction thereof, by a fine of not more than $500 for each and every day during which such offense occurs."

13/ The term "two days" as used herein excludes Saturdays, Sundays and holidays, if any.

in such a way as to extend the signals of any television broadcast station beyond its Grade B contour in violation of Section 74.1107 of the Commission's Rules, and specifically to cease and desist from supplying to its subscribers the signals of television stations WTMJ-TV, WITI-TV, WMVS, and WISN-TV, Milwaukee, Wisconsin; and WMAQ-TV, Chicago, Illinois; provided, however, that if respondent notifies the Commission during the said two-day period that it intends to seek judicial review of this order, respondent is afforded an additional 14-day period in which to file an appeal and to seek a stay of the order.

23. IT IS FURTHER ORDERED, That the request for oral argument, filed on June 28, 1966, by Booth American Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION *

[SEAL]

/s/ Ben F. Waple
Secretary

Released: July 18, 1966

* See attached Concurring Statement of Chairman Hyde

* See attached Dissenting Statement of Commissioner Bartley in which Commissioner Loevinger joins

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CONCURRING STATEMENT OF CHAIRMAN ROSEL H. HYDE

I concur in the Commission's Decision issuing the Cease and Desist Order against the North Muskegon-Muskegon CATV systems so as to call a halt to that part of their operations which violates Rule 74.1107 of our CATV regulatory program. Such action is necessary to assure that CATV systems in the top 100 markets which commenced operations after the effective date of our CATV Rules, be brought into full compliance with that program as soon as administratively feasible. In so

concluding, however, it should be made clear that the Commission is not here and now reaching any determination as to what decision on CATV carriage of these signals would be in the public interest when we later consider the full factual record supporting the pending request for waiver, or upon an evidentiary hearing if waiver is not deemed to be the appropriate procedure. Thus, while a Cease and Desist Order to eliminate the violation is the only appropriate procedure at the present time and in the present posture of the matter, it is being issued without prejudice to whatever action on the merits of this or similar situations the Commission may take when such questions are properly before it.

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DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY IN WHICH COMMISSIONER LEE LOEVINGER JOINS

I dissent. In the absence of congressional action, I agree with the respondent's contention that the Commission does not have jurisdiction over CATV systems and that, consequently, the rules adopted in the second report and order are invalid. Even assuming, arguendo, that the Commission does have jurisdiction, I believe that section 74.1107 of the rules is invalid because it contravenes section 4(c) of the Administrative Procedure Act, which provides that a substantive rule not be made effective in less than 30 days after required publication except as otherwise provided by the agency upon good cause found and published with the rule.

Section 74.1107 was made effective immediately upon the required publication. A recitation of good cause found was made on the basis of injury to the public from continued implementation of service extending grade B signals.

In my opinion, injury to the public was not supported with any factual indication or showing and was purely unfounded speculation. There

appeared to be more indication of benefit, rather than injury, to the public from the extended service in question. Consequently, the recitation of good cause found was, I believe, a nullity under section 4(c) of the Administrative Procedure Act, and the immediate effective date of the rule rendered it invalid.

The February 15 cut-off date of section 74.1107(d) appears in practical operation to be a retroactively applied effective date of the rule itself and, accordingly, a further ground for invalidity of the rule.

Moreover, I believe that section 74.1107 is not valid because adequate notice was not given on the substantive provisions imposed on implementation of service in the top 100 markets. Also, the mandatory hearing requirement seems extremely arbitrary and excessively burdensome on a CATV applicant. A serious question exists as to what kind of possible showing a CATV applicant could make to prevail against the fears expressed by the majority in the second report and order.

A basic fallacy of the CATV rules is the rationale which the Commission used to justify its assertion of jurisdiction in order to effectuate their promulgation. The rationale is on a basis so broad as to appear to encompass any kind of interstate communication, and

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thus go beyond delegatable powers of Congress. Congress can, of course, delegate certain of its powers to the Commission, but inherent in such delegation is specification of adequate guidelines. The CATV rule-making without congressional delegation of power but under jurisdiction asserted by the Commission was, I believe, so lacking in requisite guidelines as to make it unconstitutional.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Petition of)
BOOTH AMERICAN COMPANY)
For Simultaneous Decision)
Before the Commission)

PETITION FOR SIMULTANEOUS DECISION

Booth American Company respectfully requests the Commission to pass upon the merits of its pending Petition for Waiver, filed this day, to authorize the importation of distant signals by its Muskegon Area CATV system at the same time as it passes upon the merits of the proceedings in Docket 16635. It requests at any event that no final decision be issued in Docket 16635 prior to final action on the above described Petition for Waiver. In support thereof it states:

1. On May 13, 1966, the Commission issued an Order to Show Cause why Booth's Muskegon Area CATV system should not be directed to cease the importation of certain distant signals. Petitioner here is a

long-time licensee of this Commission[1/] whose record of performance in the public interest is without blemish. It is not contumacious and when the Commission in its telegram of April 20, 1966 first raised the question of possible impropriety in the operation of the Muskegon CATV system, Booth promptly stated in its reply of April 28, 1966 that if it was determined that the rules were valid as applied to its system, it would file an appropriate request for waiver and it stated further its intention

"to comply with whatever decision may be properly reached at the conclusion of the proceedings on such a waiver." The letter from Booth stated further:

> Muskegon Television System has proceeded with the construction and operation of its CATV system with diligence since the award of its first franchise in August of 1965. Muskegon has no television stations of its own and the CATV system provides a needed service to the residents of the Muskegon area. It would be unfair to both Muskegon Television System and the residents of the area to require a cessation of the service offered by the Muskegon Television System pending resolution of the questions referred to above. If, in the opinion of the Commission, authority is needed to continue operation under the circumstances described above prior to the final adjudication of the validity of its rules as applied to Muskegon Television System, authority is requested to continue the service now being offered by the system pending resolution of the matters referred to above.

The Commission in its Show Cause Order of May 13, 1966, did not pass on the merits of Booth's request for interim relief, stating "that the arguments made in support of continued operation are not properly before us and will only be adjudicated if made in connection with a petition for waiver of Section 74.1107 . . ." Booth immediately started

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1/ It presently is the licensee of the following broadcast stations: WABQ, WXEN-FM, Cleveland, Ohio; WTOD AM-FM, Toledo, Ohio; WIBM AM-FM, Jackson, Michigan; WIOU, WKMO (FM), Kokomo, Indiana; WJLB, WMZK (FM), Detroit, Michigan; WJVA AM-FM, South Bend, Indiana; and WSGW, Saginaw, Michigan.

preparation of this petition and has proceeded with all due speed in filing it; as is evident, extensive preparation was involved.

In its Petition for Waiver, Booth renewed its request for authority to operate in Northern Muskegon and Muskegon, pending final resolution of the validity of the rules as applied to it or the determination of its request for waiver. Booth has suspended construction of its CATV system in other areas pending determination of these questions. It seeks temporary authority only where service to the public is already in existence.

It is requested that action on the merits of its petition be expedited so that a determination may be made on the merits of the petition prior to the final determination of the Show Cause proceedings in Docket No. 16,635, regardless of the action taken on the request for interim relief. Favorable action on this petition will make moot the question whether a Cease and Desist Order should be issued.

Under the circumstances presented, the policy announced for the first time in Buckeye Cablevision, Inc. (FCC 66-455), released May 27, 1966, that the Commission will not pass upon requests for waiver while CATV systems are operating contrary to the rules should not be followed in this case even if special operating authority is not issued and it is determined that the present operations are contrary to the rules. As in Buckeye, this policy should only be applied prospectively; the same reasons which compelled consideration of the merits of Buckeye's request for waiver simultaneously with action on its Show Cause Order apply here. This is certainly the case since the Order to Show Cause in this proceeding indicated that the Commission would consider the merits of the waiver request without requiring a cessation of activities. Such procedure is also required by C. J. Community Services, Inc. v. Federal Communications Commission, 246 F.2d 660, where the Court of Appeals made clear that where it became known for the first time that an operation may be unlawful and substantial need for the operation exists, and procedures are contemplated or available pursuant to which the operation

may be made lawful to fulfill that need, the Commission should consider the merits of the request for legitimation prior to the time it orders a cessation of the operation by finalization of a Cease and Desist Order. The Court made clear its belief that it would be "manifestly inequitable" to require the offender to go off the air pending the final determination of the "administrative mechanism."

A Cease and Desist Order is an extraordinary writ which should only be issued under compelling circumstances and when compliance with a rule cannot be otherwise achieved. Booth has stated, and repeats here, its intention to comply with the rules if they are held to be validly applicable to its operations and if its request for waiver is lawfully rejected. There is therefore no reason to issue a Cease and Desist Order prior to consideration of the merits of the Petition for Waiver. This is certainly so when favorable action on the merits of the request for waiver will render moot the Show Cause proceeding.

Respectfully submitted,

BOOTH AMERICAN COMPANY

By _____
Marcus Cohn

_____
Paul Dobin

_____
Ronald A. Siegel

COHN AND MARKS
317 Cafritz Building
Washington, D. C.

Its Attorneys

June 10, 1966

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554

In re Petition of	)
	)
BOOTH AMERICAN COMPANY	)
	)
For Waiver of Section 74.1107 of the Commission's Rules and Other Appropriate Relief	)
	)
Before the Commission	)

EXCERPTS FROM
PETITION FOR WAIVER AND
OTHER APPROPRIATE RELIEF

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III.

THE PETITION FOR WAIVER SHOULD RECEIVE EXPEDITED CONSIDERATION AND THE MUSKEGON CATV SYSTEM SHOULD BE PERMITTED TO CONTINUE OPERATIONS IN NORTHERN MUSKEGON AND MUSKEGON PENDING DISPOSITION OF THE WAIVER REQUEST

48. Petitioner here is a long-time licensee of this Commission[23/] whose record of performance in the public interest is without blemish. It is not contumacious and when the Commission in its telegram of April 20, 1966 first raised the question of possible impropriety in the operation of the Muskegon CATV system, Booth promptly stated in its reply of April 28, 1966 that if it was determined that the rules were valid as

23/ It presently is the licensee of the following broadcast stations: WABQ, WXEN-FM, Cleveland, Ohio; WTOD AM-FM, Toledo, Ohio; WIBM AM-FM, Jackson, Michigan; WIOU, WKMO (FM), Kokomo, Indiana; WJLB, WMZK (FM), Detroit, Michigan; WJVA AM-FM, South Bend, Indiana; and WSGW, Saginaw, Michigan.

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applied to its system, it would file an appropriate request for waiver and it stated further its intention "to comply with whatever decision may be properly reached at the conclusion of the proceedings on such a waiver." The letter from Booth stated further:

> Muskegon Television System has proceeded with the construction and operation of its CATV system with diligence since the award of its first franchise in August of 1965. Muskegon has no television stations of its own and the CATV system provides a needed service to the residents of the Muskegon area. It would be unfair to both Muskegon Television System and the residents of the area to require a cessation of the service offered by the Muskegon Television System pending resolution of the questions referred to above. If, in the opinion of the Commission, authority is needed to continue operation under the circumstances described above prior to the final adjudication of the validity of its rules as applied to Muskegon Television System, authority is requested to continue the service now being offered by the system pending resolution of the matters referred to above.

49. The Commission in its Show Cause Order of May 13, 1966, did not pass on the merits of Booth's request for interim relief, stating "that the arguments made in support of continued operation are not properly before us and will only be adjudicated if made in connection with a petition for waiver of Section 74.1107 . . ." Booth immediately started preparation of this petition and has proceeded with all due speed in filing it; as is evident, extensive preparation was involved.

50. Petitioner renews its request for authority to operate in Northern Muskegon and Muskegon pending final resolution of the validity of the rules as applied to it or the determination of its request for waiver. Booth has suspended construction of its CATV system in other areas pending determination of these questions. It seeks temporary authority only where service to the public is already in existence.

51. We submit that the instant petition demonstrates a highest likelihood that it will prevail on the merits. We doubt if a stronger

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case can be made for a waiver of the importation rules. Permitting continuation of existing operations pending a decision on the merits of this petition will harm no one. No UHF station which could be affected is in operation and none will commence operations for a long time. On the other hand, the public now receiving service has a clear need and benefit from such service since the Muskegon area receives only one Grade A television signal and it would be unfortunate for the existing service to be disrupted pending a decision on the merits. The importance of maintaining existing service, even though the legality of the service is in question, is reflected by the stay of an F.C.C. cease and desist order directed toward such an operation in C. J. Community Services, Inc. v. Federal Communications Commission, 246 F.2d 660, 663, n. 6.

52. Service to the viewing public was commenced in North Muskegon 13 days before March 17, 1966, in good faith and in conformity with the standard announced in the Public Notice of February 15, 1966. Service was also intended to start in Muskegon prior to March 17, 1966, but, because of the technical difficulties (i.e., laying of cable under the highway that separates North Muskegon from Muskegon), service was not actually started until after March 17, 1966. Aside from the problem of laying the underground cable, service was ready to commence prior to March 17, 1966 and commitments for service to the subscribers were made prior to that date.

53. It would be inequitable to require Booth to cease operations under the circumstances of this case. As we have shown, cessation of existing service to subscribers would cause irreparable injury to Booth (see Par. 44, supra), and this would be true even in the period pending resolution of the waiver request. It is reasonable to anticipate that if the service was discontinued, many of the existing as well as signed up subscribers would be reluctant to reinstate service once the CATV system commenced service again.

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54. The Commission's Rules clearly contemplate that it may use its discretion to authorize temporary operation during the time it is considering whether service may be permanently authorized. See Section 74.1105; Section 74.1107(d).[24/] The Commission clearly has the power and discretion to authorize such temporary operation here and the public interest requires the exercise of that discretion to avoid irreparable injury to Booth and, more important, to the public.

55. It is requested that action on this petition be expedited so that a determination may be made on the merits of the petition prior to the final determination of the Show Cause proceedings in Docket 16,635. Favorable action on this petition will make moot the question whether a Cease and Desist Order should be issued.

56. Under the circumstances presented, the policy announced for the first time in Buckeye Cablevision, Inc. (FCC 66-455), released May 27, 1966, that the Commission will not pass upon requests for waiver while CATV systems are operating contrary to the rules should not be followed in this case even if special operating authority is not issued and it is determined that the present operations are contrary to the Rules. As in Buckeye, this policy should only be applied prospectively; the same reasons which compelled consideration of the merits of Buckeye's request for waiver simultaneously with action on its Show Cause Order apply here. This is certainly the case since the Order to Show Cause in this proceeding indicated that the Commission would

24/ Section 74.1107(d) provides for temporary relief even while the hearing required by Section 74.1107(a) is in progress. If the petition for waiver of the hearing here is denied, it is requested that the service in North Muskegon and Muskegon be authorized pending the completion of such hearing. No one will be prejudiced by the grant of such relief and valuable service will be maintained under circumstances where there is the highest likelihood that Booth will prevail on the merits if a hearing is required. Cf. C. J. Community Services, Inc. v. Federal Communications Commission, 246 F.2d 660, where the Federal Communications Commission was instructed to withhold issuance of a cease and desist order until completion of rulemaking which might make valid an illegal operation.

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consider the merits of the waiver request without requiring a cessation of activities. Such procedure is also required by C. J. Community Services, Inc. v. Federal Communications Commission, 246 F.2d 660, where the Court of Appeals made clear that where it became known for the first time that an operation may be unlawful and substantial need for the operation exists, and procedures are contemplated or available pursuant to which the operation may be made lawful to fulfill that need, the Commission should consider the merits of the request for legitimation prior to the time it orders a cessation of the operation. The Court made clear its belief that it would be "manifestly inequitable" to require the offender to go off the air pending the final determination of the "administrative mechanism." It noted that the purpose of administrative proceedings is "to serve a just result with a minimum of technical requirements" and suggested the offender request an STA. It stated only after the Commission finds itself unable to issue the STA should it resort to the cease and desist procedure. 246 F.2d at 664-65. This is exactly the procedure petitioner is following here and it is submitted that the relief requested should be granted.

Respectfully submitted,
BOOTH AMERICAN COMPANY
By _____
Marcus Cohn

_____
Paul Dobin

_____
Ronald A. Siegel

COHN AND MARKS
* * *
Its Attorneys

June 10, 1966

[Tr. 1]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

VOLUME 1

BEFORE THE FEDERAL COMMUNICATIONS CONFERENCE

(Prehearing Conference)

June 6, 1966

In the Matter of:	
Cease and Desist Order to be directed against Muskegon Television System and Booth Communications Company, owners and operators of a community antenna television system at Muskegon, Michigan	DOCKET NO. 16635

The above-entitled matter came on for prehearing conference, pursuant to notice, before Walter W. Guenther (The Presiding Examiner) in room 1146, New Post Office Building, Washington, D. C., at 10 a.m.

* * * * *

[Tr. 3]

PRESIDING EXAMINER: Is anyone else appearing? I hear no response.

Before I let Mr. Chachkin proceed, because under the statute he has the burden of proceeding with the introduction of evidence and the burden of proof in this hearing, I would like to make some general observations.

Mr. Dobin, you heard the word. The word was observations, it does not mean rulings. Before I make these observations, I am fully

aware of having learned counsel present such as Mr. Dobin, it may be better on my part to withhold any comments or observations until I have heard from counsel.

But I think since both counsel are alert enough to get the impact of certain observations I am going to make immediately we will benefit by having them made. Then when I get the reactions I will benefit myself and the Commission will, so I am going to start with some general observations.

These are easued [caused] by the very nice pre-exchange on behalf of counsel for the respondent of certain letters in order to expedite matters which may come up today in preparation for the hearing.

Now the copy of counsel, Mr. Dobin, which shows your address, Mr. Chachkin, aside from referring to the documents

[Tr. 4]

which are forwarded for exchange, there are these basic approaches and I quote the second sentence, "Pursuant to" and then it names the community services decision which was rendered in the court and it names the Section 1.91(e) of the Commission's rules.

The letter says, "Pursuant to these matters the documents that are attached ~~to~~ [the] respondent intends to offer at the hearing," and he wants comment of Bureau counsel as to whether he will raise any question concerning number one, authenticity of signatures under documents submitted, and; number two, as to whether any question of hearsay when the documents are offered at the hearing will be raised.

When I first saw the reference to these two basic concepts of law, one on the community ~~service and~~ [services case and] the concept of law, I alerted myself as to my thinking that I would have no identification with my sense of support for the position taken by counsel, Mr. Dobin.

As an observation, I throw out this: Let us pursue the matter to which extent law as read out by counsel Dobin ~~in~~ [in the] Community Services case is applicable or not. I raise only that question.

[Tr. 4]

I think the basis for the Community Services decision is spelled out on page 664 in that one paragraph and on page 666.

On page 664, I read from the last two or three lines of the column at the left. "It is clear that the Commission

[Tr. 5]

decided it had no discretion once it found a violation to exist. It even so argued."

That is the basis of this decision.

Then in that column on the right of this page 664, the court says, "Furthermore," -- and I consider this very basic -- "we say that only short of the appellant's statutory right the Commission acted mistakenly in its belief that it lacked discretion to withhold the issues of a Cease and Desist Order and upon this point the Commission's order must be reversed."

These two basic statements, I think, are the underlying premise of the court's rationale and therefore whatever law is read out of it should be gauged against it.

Furthermore, I read from the end of page 666 on that first paragraph following and I only quote the last six lines of that paragraph, "Here the Commission concluded that it possessed no authority whatever to determine whether an order 'should issue', once the fact of violation was established."

Now, for observation where I would like to get the comments of counsel later on, I throw out, so viewed, I don't think respondents can rely upon this case in support of what has been submitted as justifying the introduction of the documents, number one.

~~No. 3101(e)~~ [Now, 1.91(e)] of the Commission's rules, there I was frustrated. I looked at the rules and I find that when you

[Tr. 6]

go to the heading after Rule 1.77 of the Commission's rules, the heading before ~~1.780~~ [1.78] is Miscellaneous Proceeding and then 1.80 it starts from forfeiture proceedings and it goes under 1.81 other forfeiture proceedings and then 1.84 with respect to commercial radio operators' license and finally we come to 1.91 where it says, "Revocation and/or cease and desist proceedings; [hearings,] ~~are one and the same accordingly herein~~", and paragraph (a) reads:

"If it appears that a station license or construction permit should be revoked or that a cease and desist order should be issued" -- and then it goes on.

Let me note this, this 1.91 does not read, if it could be used in the way that you are using it by saying this, if it would have read: "In proceedings before the Commission instituted as the result of the issuance of the cease and desist order", then I may have no quarrel with you.

But this thing bothers me.

Now, I am fully aware, Mr. Dobin, that the Commission opened the door to your very shrewd attack and it opened the door by this ["]unfortunate["] footnote 4 in which it made a reference to 1.91(c) and the question that arose with the Commission there was where the Commission abandoned its total approach and opened the door for your approach.

There I have to say two things. Mr. Dobin, you are aware of the second case under CATV. I read the rules twice. Maybe

[Tr. 7]

I don't read them ~~twice~~ [right]. But, number one, weighted against the procedural provisions in the Commission rule, namely 1.91, weighted against the contents of the CATV rules, Second Report and Order, I would construe this use of the Commission in its order to you addressed by reference to 1.91(c) [a] ~~an~~ unregrettable mistake.

I would think that ~~the premise for~~ your hearing rights are sufficiently protected by the statutory right of ~~3.12(c)~~ [312(c)] and I would think that the CATV [rules] are ~~ex parte talis, they~~ [lex specials; these] are procedural matters, and I don't think any reliance should be on these.

I note from the latest release which the Commission sent out, which is the release of May 27, 1966, which is a Memorandum Opinion and Order[;] ~~that~~ the Commission had before it, certain petitions for stay.

I read to you only the last sentence of the paragraph 30 therein:

"Such operations will have to stop prior to Commission consideration of the merits and will not be taken into account in that consideration."

That means violation of rules or operation ~~or~~ [in] violation of rules.

The whole ~~tneer~~ [tenor] of the Commission's approach to its rules and its procedures as set out and thereby also waiver procedure and ~~hereinunder~~ [thereinunder] waiver claimed, I think makes entirely

[Tr. 8]

inappropriate, Mr. Dobin -- and I want to hear argument -- the matter of the applicability of anything that the Commission throws ~~under~~ [out] 1.91(e).

Furthermore, even if I would concede that the Commission opened the door with its reliance upon 1.91(c), under (e), there would be only admissible, if we say it loosely "corrections or promise to correct the conditions complained of and the past record of the licensee."

There is no and and/or. There is ~~an or~~ ["and"] only. I would not admit anything that has to do with "past record of the licensee" because the analogy just does not apply under the second report and order.

Therefore, I have my preliminary observations and I did make them. Maybe I made a fool of myself. I know counsel are learned enough to get the implication of them and I will hear from them.

* * * * *

[Tr. 64]

June 16, 1966

* * * * *

[Tr. 71]

PRESIDING EXAMINER: To spare you much argument, Mr. Dobin,

[Tr. 72]

when you make your showing on the order, let me make a summary statement which is in the nature of a ruling in view of the lengthy discussions we had in the prehearing conference.

I am fully aware of the position that the Bureau took at that conference and your position. Let me ask you again. Mr. Chachkin, your position stays put as you stated, and your position as to the matter that is relevant and material. You have seen the exhibits. Do you stand pat on your position?

MR. CHACHKIN: Our position is that the matter is very narrow and we stand pat on that position.

PRESIDING EXAMINER: Mr. Dobin, I will let you go forward in introducing your evidence. In interpreting your rights as to what to produce and what not to produce, I can only concede to Bureau counsel that Paragraph 5 of the Cease and Desist order states the only issue to be considered is compliance with the rules, but as I read the Commission's order directed to you, the framework within which you can go forward is this: "You are directed to show cause why Booth American Company should not be ordered to cease and desist from further operation."

This is the way I see the issues framed in this hearing. Accordingly, I will read into 1.91 the Court's law in the C J Community Services Inc.

Now you know my position.

* * * * *

[Tr. 110]

MR. CHACHKIN: I would submit that the Examiner is duty-bound to try this case in accordance with Commission precedent, particularly when there is no ambiguity and Commission precedent is so clear on this point.

There can be no question at all what the Commission is intending by designating this case for hearing. The decisions in Buckeye and Poway make explicit the nature and purpose of the hearing, what is involved in this hearing, the fact that what

[Tr. 111]

we have here is more or less merely to determine whether or not there has been a violation of the rules in order to insure that the public interest questions will be made prior to the commencement of bringing in distant signals rather than subsequent.

Let me point out, Mr. Examiner, you previously averted to the C&J Case. I think it is clear that that case is not apposite to this situation.

As I stated previously[,] in C&J we had two fundamental differences than we have in this proceeding.

Number one, in the C&J proceeding at the time the court decided the indication the Commission had not adopted any rules whereby a booster could legitimize its operation.

Here the Commission has adopted an orderly procedure. They merely state, Look, before we let you commence bringing in these distant signals, we feel the public interest requires us to make a determination as to whether this would be in the public interest, but they are fully affording the applicant an opportunity to bring in any evidence which he may deem relevant to the public interest question.

They are not depriving the applicant of any of his procedural or substantive rights. They have merely adopted this two-stage procedure because as stated in the second report, they feel this is necessary and required.

[Tr. 113]

Secondly, I might also point out unlike the situation in

[Tr. 112]

C & J, which the court was confronted with, where the people in this community did not have available any television service, the facts stipulated establish that there is one Grade A signal that Muskegon and North Muskegon fall within the predicted Grade A contour of one Grand Rapids station and fall within the Grade B predicted contours of two other stations.

These facts have been stipulated to.

Thus, in view of these important distinctions, particularly the fact that the Commission has established a procedure where there will be a determination on the merits, it is clear that C&J is ~~in apposite~~ [inapposite].

In view of all of this precedent, we submit all of this material, Mr. Examiner, is irrelevant and immaterial to the issue framed and which we have before us in this proceeding.

PRESIDING EXAMINER: Mr. Chachkin, would you say my preliminary remark to Mr. Dobin as to the way I read the issue here and the broader framework by pointing out the last statement in paragraph 6 that Booth American "is directed to show cause [why] Booth American should not be ordered to cease and desist from further operations"?

Would you now say in so viewing the issue in this broader framework I misinterpreted the Commission's direction?

MR. CHACHKIN: Yes, Mr. Examiner, I certainly would. I think the precedent is clear on that point.

PRESIDING EXAMINER: Do you mean there is no appeal to be

[Tr. 113]

made by this respondent to the Commission with respect to whether the Commission should exercise its discretion in this case to issue a Cease and Desist Order.

[Tr. 113]

Do you bar this respondent in this hearing from making any showing to an extent so far relevant and material whether or not the Commission should issue an order in this case that is what he is barred from.

MR. CHACHKIN: In view of the Commission's second report and order where they have made a determination that before they allow the commencement of distant signals the public interest requires a hearing on the merits as to whether the public interest would be served by allowing the inception of that service, I believe in view of that determination by the Commission, which I submit is wholly proper, that this hearing is limited merely to whether or not the applicant is in compliance with Section 74.1107 of the rules and that is the sole issue.

PRESIDING EXAMINER: Would your characterization "wholly proper" also imply that thereby a respondent "gets his day in court"?

MR. CHACHKIN: The Commission has made clear the purpose of this proceeding is merely to determine whether or not he is in compliance with the rule and they have provided the machinery for him to get his day in court at the time that he requests waiver.

This is the orderly procedure established.

* * * * *

[Tr. 141]

MR. CHACHKIN: My argument is simply this, Mr. Examiner, that whether or not the witness interpreted the rule to mean A or B is totally irrelevant.

PRESIDING EXAMINER: He read it and the words here printed, which he read off a copy, say "all television stations." The question goes to the changes but not to the reading of the plain word "all."

* * * * *

[Tr. 147]

EDWARD H. CLARK

the witness on the stand at time of recess, resumed the stand and testified further as follows:

DIRECT EXAMINATION (resumed)

BY MR. DOBIN:

* * * * *

[Tr. 154]

Q. Did you feel you were taking any steps to accelerate service because of any deadlines? A. No.

Q. All your steps so far as you are concerned in your mind were taken in the normal course of business? A. They were planned in the normal course of business.

* * * * *

[Tr. 159]

PRESIDING EXAMINER: The purpose I allowed for the showing is that the statements set forth by this witness the way we now have them before us, try to provide a factual basis, if at all, to the Commission when it considers before it this present matter, whether it should issue a cease and desist order and what matters it should consider in the weighing of discretion and whether or not it should or should not issue a cease and desist order.

* * * * *

[Tr. 191]

MR. CHACHKIN: I object to the first sentence in the second paragraph on page 23 beginning: "I also point out the continuance of the CATV service cannot have an adverse impact on any UHF stations" again actually is no foundation for any of these things. The Commission holds hearings to determine whether economic injury will be caused.

It is a complete full hearing. Witnesses are called. Here the witness is being allowed to make a bold statement.

PRESIDING EXAMINER: Because there are presently no UHF stations on the air in the area. Read the whole sentence. It may be meaningless but he states his opinion there. If there is no UHF how can it hurt the UHF?

MR. CHACHKIN: It can hurt whether UHF's will be established in the community. It is not a question of whether they exist but what are the chances for growth of UHF. That is the Commission's concern; not that it will hurt only existing UHF, what effect will it have on the growth of UHF in the area and I submit there are no facts established here pointing to that.

MR. DOBIN: This must be read in the context of the paragraph above. If you read the end of that same paragraph on top of 24 it is clear that is the meaning. He talks about

[Tr. 192]

the stations can't get on the air before the waiver request. In other words, this deals solely with the present period. The reason why right now this minute he is not hurting a single UHF and can't hurt a UHF is because there are none on the air. That is true until you get around to acting on the waiver request.

* * * * *

[Tr. 248]

115

[Tr. 233]

June 17, 1966

* * * * *

[Tr. 247]

DIRECT EXAMINATION (Resumed)

BY MR. NEUSTADT:

Q. Mr. Clark, did you on behalf of Booth American make an effort to determine the extent to which satisfactory viewing [of] television signals are [is] currently available in the Greater Muskegon area from existing television stations off the air?

MR. CHACHKIN: Objection to the form of the question. It is a leading question.

PRESIDING EXAMINER: Can you rephrase it?

MR. NEUSTADT: I readily admit that that was a leading question.

[Tr. 248]

PRESIDING EXAMINER: Well, we have one agreement.

BY MR. NEUSTADT:

Q. Mr. Clark, what technical studies did you make in preparation for the institution of the CATV system which is the subject of this proceeding? A. I made an independent ~~production~~ [computation] of the Grade A and Grade B of the three existing stations --

MR. CHACHKIN: Objection. It is not responsive to the question. The question is what studies did you make?

MR. NEUSTADT: I don't understand the objection.

PRESIDING EXAMINER: This is part of the answer. The objection is overruled.

THE WITNESS: I made an independent study and predicted my own computations of the particular Grade A and Grade B ~~se~~ [of] the three existing stations in the Kalamazoo Grade Rapids market.

PRESIDING EXAMINER: Which are they?

THE WITNESS: WZZM, WOOD-TV, Grand Rapids, WKZO-TV, Kalamazoo -- also I would project the Grade B's from Milwaukee, Wisconsin in the direction of Muskegon and WTTV, Cadillac, Michigan, to determine what the coverage of Muskegon was in terms of ~~transmitters~~ [transmissions].

Also I examined the license files indicating the terrain and their projected grade A's and grade B's.

[Tr. 249]

BY MR. NEUSTADT:

Q. Mr. Clark, could you tell us approximately at least or precisely if you can the radial directions from the stations that you are discussing, the three Michigan stations you are discussing, toward the area which you propose with this CATV system?

MR. CHACHKIN: Objection. There was no foundation laid that there was any such work done.

PRESIDING EXAMINER: He said he checked the application file. If it does not mean he was present there. Tell me what he noted when he checked the application file as a predicate for this question unless you assume I know the files contain it.

BY MR. NEUSTADT:

Q. Do you know the directions from these stations toward the area that you are going to serve, Mr. Clark? A. Yes.

Q. Could you tell us what they are? A. For the direction to Muskegon from the transmitter site of WOOD-TV it is approximately 315 degrees true. The direction from Kalamazoo, WKZO-TV, it is approximately the same bearing. It is slightly to the north. I would say about 320 degrees true.

MR. CHACHKIN: I object to the answer, Mr. Examiner.

There has been no showing made on what basis this

[Tr. 250]

determination was made as to the direction. How did he determine these directions? What did he use? What did he do?

MR. NEUSTADT: That is an incomprehensible objection. It might be appropriate for cross examination.

PRESIDING EXAMINER: Ojection overruled. You can challenge the basis of his knowledge later.

BY MR. NEUSTADT:

Q. I don't think you gave us the third direction, Mr. Clark.

A. The direction from ~~WFTD~~ [WWTJ,] Cadillac, Michigan, is approximately 225 degrees true to the Muskegon market.

Q. Are you familiar with the nature of the terrain in those directions between the stations you have referred to and the area of this CATV system, and the answer to that question must be either yes or no. A. Yes.

Q. Could you tell us how you acquired that familiarity, Mr. Clark? A. In two ways. I have traveled this area quite frequently in these areas and also I have examined topographic maps on which I have overlayed the bearings.

Q. When you refer to topographical maps, could you describe those in somewhat more precise a manner and the source of the maps? A. They are U. S. Topographical Quadrangle maps that

[Tr. 251]

give the elevations of various terrains in the areas that they cover.

Q. Could you describe for the record, Mr. Clark, any terrain features of which you are familiar on the basis you have just given us which would affect either adversely or favorably the reception of the signals of these three stations in Muskegon or in the greater Muskegon area?

MR CHACHKIN: I object to the question. There are all kinds of conclusions stated in the question. First of all we have not

established whether -- what terrain -- whether there is any terrain factors or the basis for it or whether there is any more elevation over the transmitters. We have not gone into this at all.

PRESIDING EXAMINER: Read the question back please.

(The question referred to was read by the reporter.)

PRESIDING EXAMINER: The question is two-fold. I think it is clear, terrain features --

MR. CHACHKIN: I submit the fact that he traveled in areas unspecified and he examined topographic maps is not sufficient basis for him now to state a conclusion.

PRESIDING EXAMINER: He is trying to elicit the knowledge of the terrain feature. Let him answer that first. We are going away from purley answer on ~~topographicalmaps~~ [topographic maps].

MR. CHACHKIN: What is he relying on?

PRESIDING EXAMINER: He is to answer whether he knows the

[Tr. 252]

terrain features.

MR. NEUSTADT: I would like to clarify this. My question asked on the basis of he just gave us and the basis were not his knowledge of the area from having been there and from examining topographical maps over which he laid out the radials in these particular directions. I don't know what other basis Commission Counsel would like ~~tom ebody~~ [somebody] to use but those are the ones I think are customarily used.

PRESIDING EXAMINER: You may answer.

THE WITNESS: The significant terrain features from the WOOD-TV location in the area just slightly beyond the ten mile range from the site there are a series of short hills, one significant one being directly on 315 bearing which is called DIAS Hill. For the elevation it goes up approximately abruptly from an average terrain approximating 800 feet above sea level to 1020.

MR. NEUSTADT: I would like the record to reflect that Commission

Counsel and his engineer are very eagerly pouring over sectional charts while this testimony is being given which it seems to me, although some of my remarks may be utter nonsense, reflect some doubt on the ability or inability of Commission Counsel to cross examine which he expressed so vigorously.

PRESIDING EXAMINER: Mr. Neustadt, you did not have to make that remark. If you sit at that table and have a witness

[Tr. 253]

from your competitor there and he starts to answer or consult your engineers to what extent an answer is given this can be checked by further cross examination. There is no sinister intention on the part of Mr. [Mc]Connell assisting Mr. Chachkin and there is also no way of being prepared.

MR. NEUSTADT: I apologize. I did not intend anything about Mr. McConnell.

MR. CHACHKIN: His remarks were addressed to me, Mr. Examiner.

PRESIDING EXAMINER: I don't want these remarks on the record. There is no need for it. Please let's continue with the hearing. There are more important things to do.

MR. NEUSTADT: I think you just described Dias Hill and describing the terrain between WOOD-TV and Muskegon.

THE WITNESS: As you go forward toward Muskegon from Grand Rapids there is a series of hills and you get into a dropping terrain which drops from approximately 800 feet above sea level in the vicinity of the 2 to 10 mile range on bearing 315 to approximately 600 feet at Muskegon. I maintain if you take the earth curvature and consider this terrain and this dropping off at some point midway, there will be a certain amount of shadowning due to this and also due to the effect of Dias Hill which is beyond the ten mile range.

[Tr. 254]

[Tr. 254]

BY MR. NEUSTADT:

Q. So the record may be clearer, when you say there will be a certain amount of shadowning, could you describe what that means in lay terms in the sense of what that means for the viewer who switches on his television set?

PRESIDING EXAMINER: If you answer this question, Mr. Clark, you used the term unsatisfactory signal here. Answer what you had in mind what would be a satisfactory signal.

Go ahead.

THE WITNESS: What I have in mind would be a reduction of the field intensity beyond this drop in terrain, and it would result in a lesser signal or less satisfactory signal or in some cases an unsatisfactory signal in the area of Muskegon.

BY MR. NEUSTADT:

Q. Less satisfactory than what or reduction of signal over what or compared with what? A. A reduction of signal from the predicted field intensity based on the FCC's graphs in the Muskegon area.

Q. Mr. Clark, you have now described as I understand it the nature of the terrain between station WOOD-TV and Muskegon --

MR. CHACHKIN: I object to the witness' statement that he described it. All he described was there was Dias Hill and there were some dropping hills.

[Tr. 255]

PRESIDING EXAMINER: Let's rephrase the ~~question~~ [statement] saying you now gave certain testimony.

MR. NEUSTADT: About WOOD. Certainly the record will speak for itself.

PRESIDING EXAMINER: Proceed.

BY MR. NEUSTADT:

Q. Could you provide the same type of analysis -- I don't mean

the same results necessarily -- but the same type of analysis for the record with respect to the other stations that you referred to? A. With respect to WKZO-TV which is located in somewhat the same area only south of the transmitter site of WOOD-TV you have a similar condition as you approach the area to Grand Rapids and to some extent near its own transmitter site. You do not have a Dias Hill abruptly in the area but you do have a dropping terrain at some point that is relatively close to Muskegon where you drop off from an elevation of approximately 800 feet above sea level down to approximately over 600 over a considerable area which is close to Muskegon and at some distance from WKZO.

PRESIDING EXAMINER: What about WZZM?

MR. NEUSTADT: Now that you have asked, Mr. Examiner, the present state of the record may not require that, but since you asked, why don't you go ahead, Mr. Clark?

THE WITNESS: WZZM has very little terrain problem.

There is a slight change in elevation. WZZM is located northwest of the city of Grand Rapids and the signal from WZZM into Grand Rapids is approximately as predicted.

PRESIDING EXAMINER: Let the record show that the testimony just given by Mr. Clark as to the engineering features in no way was given upon reliance on any notes or anything. All of the testimony was given from his own knowledge.

BY MR. NEUSTADT:

Q. I have only one other question in this connection, Mr. Clark. Can you tell us with reference to the plans or implementation of the plans for this CATV system when you reached the conclusions you have just described? That is, did you reach them before, during or after? A. The conclusions of the signal into Muskegon -- we made some study originally to determine what was available there and to determine how strong the signal was.

[Tr. 256]

This is done on the basis of predicted contours and knowledge of the terrain and the condition of the terrain and of actually viewing the pictures in the Greater Muskegon Area.

* * * * *

[Tr. 287]

CROSS EXAMINATION

BY MR. CHACHKIN:

* * * * *

[Tr. 306]

Q. Was there any discussion about the language of the notice insofar as it applied to your Muskegon operations, whether you would find the notice affecting your Muskegon operations? A. No. I felt it was very clear in the February 15th release that it was very clear that it would not affect our Muskegon operations.

* * * * *

[Tr. 310]

Q. Mr. Clark, was there anything which prevented you from consulting your lawyer before deciding to proceed with the construction and establishment of a CATV system in North Muskegon? A. There was nothing to prevent, no, but I did not consider it necessary.

Q. You made your own decision not to consult a lawyer and make your interpretation and go ahead on your own? A. Yes, sir.

Q. Before making this decision, did you discuss it with any other officials of Booth American? A. Mr. Booth and I had discussed it at the time.

Q. What was the nature of the discussion with Mr. Booth concerning this matter? A. We were reading the February 15 release and commenting on whether or not Muskegon, North Muskegon and other interests were considered to be within the first 100 markets.

[Tr. 323]

[Tr. 311]

Q. Did you discuss with Mr. Booth your interpretation of the language which you believed exempted you from a hearing? A. Yes.

Q. What was the nature of this discussion? A. Merely that the language of the February 15 release indicated that all Grade A's would have to cover Muskegon before it could be considered to be within the 100 markets and he agreed with me in re-reading the language that we both came to the conclusion that Muskegon was not within the first 100 markets.

Q. Did any other officials of Booth American, to your knowledge, discuss the Commission's CATV actions in the period February 15 to March 17 with any counsel? A. Not to my knowledge.

* * * * *

[Tr. 322]

Q. My question is, sir, upon learning approximately March 8th that the Commission's hearing requirements

[Tr. 323]

apply to the Muskegon CATV system, did you then suspend construction in Muskegon? A. No, because cable and construction had progressed to quite a point at that time in Muskegon as well as in North Muskegon. We were already in operation in North Muskegon.

Q. Your answer is then you did not suspend construction?

A. Yes, I did not suspend construction.

Q. But you did cease construction in the other areas where you obtained franchises or licenses, did you not? A. Where it was applicable, yes.

Q. Pardon me? A. Where the February 15th and March 8th release were applicable, yes.

Q. But you chose to continue construction in Muskegon although

you knew then that the hearing requirement applied to the Muskegon CATV system?

MR. NEUSTADT: I respectfully suggest at this point counsel is requesting a legal conclusion. If not, I wish it could be so stated. I happen to not agree even with counsel. That is what proves it is a legal conclusion.

MR. CHACHKIN: I am not suggesting a legal conclusion. This witness stated he got the notice of February 15th.

It was his judgment that it did not apply and that he could go ahead and now he has told us on March 8th or there

[Tr. 324]

abouts he received the Commission's promulgation of their rules and he became aware that it did apply. My question is then in view of this fact you nevertheless still continued to construct?

MR. NEUSTADT: He answered that. That is already in the record.

MR. CHACHKIN: Would the reporter read back my question?

(The question referred to was read by the reporter.)

MR. NEUSTADT: I don't wish any answer to this question to be construed as an admission that Muskegon is a separate system as distinguished from North Muskegon. I take it when counsel says Muskegon he means Greater Muskegon, or does he?

MR. CHACHKIN: I mean the system located in the City of Muskegon. We have five separate franchises and licenses here and there is no dispute about that.

PRESIDING EXAMINER: Is it clear to you now what he means?

THE WITNESS: I believe it is.

PRESIDING EXAMINER: Can you answer it?

THE WITNESS: Yes, I will answer that.

My personal conclusion which was on my shoulders, I suppose, was that the term geographical area did not refer to a city with suburbs

or a city complex or an urbanized area. I assumed rightly or wrongly at that time that if we are referring to a difference -- a different geographical

[Tr. 325]

area, we are moving perhaps into Grand Rapids with this thing which is a different geographical area.

The matter was so confused in my mind and in the trade at that time, I think, there was talk of extending the period of effectiveness of the rules.

There was talk of congressional anxiety and anger in some cases and we did not know what was going on. So I decided as I say rightly or wrongly, to proceed in the area where the trunk cable was practically all completed.

BY MR. CHACHKIN:

Q. The fact of the matter is you did not commence operations in Muskegon until April 15, 1966, after which time you were apprised of the Commission's rules but nevertheless you continued to expend money and continued to proceed ahead with your operations?

MR. NEUSTADT: That did not sound like a question to me, Mr. Examiner.

PRESIDING EXAMINER: Put it in question form.

BY MR. CHACHKIN:

Q. Did you continue to expend money although you were aware that the Commission's rules were applicable to your situation? A. I was aware of certain statements and releases from the Commission on one side. On the other side of the ledger, a lot of confusion and arguments, threats of action and so forth.

[Tr. 326]

So frankly I did not know where I was. We just kept on going.

[Tr. 326]

Q. If as you say you felt that Muskegon is in the same geographical area, then why did you suspend construction in the other areas?
A. What was the question?

Q. My question is if you were of the view that you contend that you were allowed to continue in Muskegon because it was part of the same geographical area, my question is why did you then suspend construction in the other areas? A. This was done subsequent to April 15th. At that time there was an indication from, I believe WOOD-TV where they had questioned the actions in Muskegon informally.

At that point I contacted Cohn and [Marks] and asked them to take what legal action they thought appropriate. It was subsequent to that that we suspended operations in the other Greater Muskegon Areas.

Q. When did you officially instruct the telephone company, as indicated on page 15 of your exhibit A, to suspend construction in these other areas, namely the areas aside from Muskegon and North Muskegon?

MR. NEUSTADT: Can I show him the exhibit?

MR. CHACHKIN: Certainly.

MR. NEUSTADT: I presume the witness may now answer that question.

[Tr. 327]

PRESIDING EXAMINER: Yes.

THE WITNESS: The date was approximately May 25th. However there had been no construction started in areas other than Muskegon and North Muskegon up to that time, even up to May 25th. No monies had been expended.

BY MR. CHACHKIN:

Q. Am I correct, Mr. Clark, when you decided to go ahead in Muskegon, although you became apprised of the Commission's rules which applied to your Muskegon situation, this was a business judgment on your part? A. Yes. We had anticipated having Muskegon the city

of Muskegon or portions of it ready for operations on March 3rd the same as North Muskegon but it was a lack of a piece of cable that prevented this. It was not until April 15th that we energized the cable that had already been constructed in Muskegon on the date March 3 which could have been put into operations otherwise.

Q. The fact of the matter is you did not commence operations until April 15th? A. In the City of Muskegon, that is correct.

Q. Sir, with respect to page 3 of exhibit A, you make the statement and I quote: "Booth has stated and repeats here its intention to comply with Commission's rules if they are held to be validly applicable to its operations and if its request for its waiver is lawfully rejected."

[Tr. 328]

Q. What precisely does that mean? A. I believe it means what it says.

Q. When do you intend to comply? By this language I want the record to be clear as to exactly what Booth means when they say they intend to comply. At what precise time Mr. Booth replied? A. I cannot answer that question. It is up to our attorney to answer it.

Q. This is your statement and I am asking you what you mean by the statement?

PRESIDING EXAMINER: Let him answer what he understands the statement means.

THE WITNESS: My understanding of what I said in here, and I did say it, was when it was determined that this rule actually applied to us in view of the circumstances surrounding the February 15th and March 8th orders, if this was finally determined to apply to our case, that is, the March 8th understanding --

BY MR. CHACHKIN:

Q. Determined by whom? A. I suppose proper courts if necessary.

Q. Is it clear by this you did not mean if the Commission should issue a cease and desist order you will not consider that sufficient for you to comply, is that right? You have no intention to comply if the Commission issues a

[Tr. 329]

cease and desist order? A. I do not know at this time. If the Commission issues a cease and desist order it would be appropriate to stop right then but there are other considerations.

Q. My question to you is then would that be sufficient to constitute in your judgment a valid determination of the applicable rules to your case? Would you consider that sufficient? A. The simple issuing of a cease and desist order?

Q. Yes. A. Of course I am not an attorney and you have me on a legal point here. My own impression is if the Commission issued a cease and desist order without considering other things which have been filed here, perhaps we would request reconsideration in other things. In here I am talking about the final judgment in some manner to say we are in the wrong and we must cease and desist. Under those conditions we would stop.

Q. I am aware of that but I want to understand what you are talking about your conditional willingness to comply. By that you mean if the Commission should determine that based on the evidence adduced a cease and desist order should issue against Muskegon, will Booth then cease and desist,suspend its carrying of distant signals? A. Again I state it depends on many things at the

[Tr. 330]

time, whether we felt we had been given fair consideration of this matter. You see, we have expended and committed ourselves to a considerable amount of money and this was done prior to the February 15th release.

The question I think revolved on when is the CATV system in operation, the one under construction. This money has to be put out before you can turn the switch. This was all done prior to February 15th.

Q. So you are unable to state at this time, Sir, if the Commission should determine --

MR. NEUSTADT: Mr. Examiner, I know that counsel on cross examination is entitled to a substantial amount of leeway, but this same question has now been asked five times. The witness responded to it completely initially by saying that he would consult his attorneys and that it was essentially a legal question. He has now given his own impression of what he admitted to be essentially a legal determination. He has given that impression twice very fully, and I object to this question.

PRESIDING EXAMINER: Do you want the record to go forward with his present statement? Are you satisfied with the answers he just gave?

MR. NEUSTADT: I certainly am.

PRESIDING EXAMINER: He is satisfied so we will not take any more from this witness. He is satisfied.

[Tr. 331]

BY MR. CHACHKIN:

Q. Is the witness unwilling to make an unequivocal statement as to whether it would comply or not in the event the Commission should determine that a cease and desist order should issue?

MR. NEUSTADT: I will state on behalf of the applicant that we are unwilling to make such a representation at this time.

PRESIDING EXAMINER: Let the witness answer that. Do you want to answer that, Mr. Clark?

THE WITNESS: Yes. I don't want to copy the words of the attorney but I say we are unwilling at this time to make this commitment.

* * * * *

BRIEF FOR APPELLANT BOOTH AMERICAN COMPANY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

BOOTH AMERICAN COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal From a Decision of the
Federal Communications Commission

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STATEMENT OF QUESTIONS PRESENTED

Counsel for the parties have agreed by a prehearing stipulation dated September 13, 1966 and approved by the Court on September 22, 1966 that the questions presented by this appeal are as follows:

1. Whether Section 74.1107 of the Commission's Rules (Top 100 Market Rule) was legally adopted in accordance with notice requirements of Section 4 of the Administrative Procedure Act.

2. (a) Whether the Commission in its February 15, 1966 Public Notice informed the Appellant that its proposed CATV operation would not require prior FCC approval because its system was located within the Grade A contour of only one television station.

(b) If so and if Appellant commenced operation in reliance on the Notice before the Commission changed the provisions of the Notice —

(1) Can the Commission lawfully apply its rules as finally adopted to Appellant's operation.

(2) Can the Commission order Appellant to cease and desist its current operations before considering Appellant's requests for the following:

(i) Its request for temporary operating authority;

(ii) Its request for permanent operating authority;

(iii) Its request for expedited consideration of its request for appropriate authority.

3. Whether the Commission erred in excluding evidence in support of Appellant's request that no cease and desist order should be issued pending disposition of Appellant's above requests.

4. Whether the Commission erred in depriving Appellant of the Hearing Examiner's initial decision or a tentative decision of the Commission *en banc*, prior to the issuance of a final decision.[1]

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[1] Appellant takes the following position: it raised in its Notice of Appeal the question of the asserted jurisdiction of the Commission to regulate CATV systems that do not utilize microwave radio but who receive their signals solely off the air. It raised this question, however, solely to protect its rights, if in separate judicial proceedings it is held that the Commission was without power to issue the CATV rules. The question of the Commission's jurisdiction is now pending in a number of cases to be heard in the Eighth Circuit Court of Appeals. The Court of Appeals for the District of Columbia Circuit has remanded cases before it raising this question to the Eighth Circuit. Appellant, therefore, does not intend to brief this jurisdictional question before the Court unless the jurisdictional questions are not settled in these other cases. In that event, the Appellant will request an opportunity to brief and argue the question of the Commission's jurisdiction, particularly if this Court is not otherwise able to reach a decision favorable to the Appellant on the matters briefed.

Appellee takes the position that the issue of jurisdiction has been abandoned by Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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* Cases and other authorities chiefly relied upon are marked with an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

BOOTH AMERICAN COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal From a Decision of the
Federal Communications Commission

BRIEF FOR APPELLANT BOOTH AMERICAN COMPANY

JURISDICTIONAL STATEMENT

This is an appeal by Booth American Company, Appellant herein, pursuant to Section 402(b)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(7) and Rule 37 of the General Rules of this Court, from a Decision of the Federal Communications Commission (Commission), released on July 18, 1966, in which the Commission

ordered that Appellant cease and desist from carrying the signals of certain television stations on its community antenna television system (CATV) in Muskegon and North Muskegon, Michigan (R. 203-218).[1]

STATEMENT OF THE CASE

I. Appellant's CATV system

The Greater Muskegon Area of Michigan is one of the larger "underserved" television areas of the United States.[2] No local television stations are there in operation and no station provides a very high quality (principal community or city grade) signal to the area (R. 37, 73). One station, WZZM-TV, in Grand Rapids, Michigan, provides a Grade A signal to the area and two stations, WOOD-TV, Grand Rapids, Michigan, and WKZO-TV, Kalamazoo, Michigan, provide the lowest grade predicted signal (Grade B) to the area[3] (R. 95). Moreover, because of local terrain conditions, the

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[1] Reference to transcript pages "Tr. " and record pages "R. " are to the record below.

[2] See Television Corporation of Michigan, Inc. v. Federal Communications Commission, 111 U. S. App. D. C. 101, 294 F.2d 730,where this Court set aside an FCC decision looking toward the elimination of needed television service in this area.

The Greater Muskegon Area is composed of North Muskegon, Muskegon, Muskegon Township, Muskegon Heights, Norton Township, Roosevelt Park and Laketon Township. According to the 1960 U. S. Census, the total population of the communities thus included within the Greater Muskegon Area is 111,937.

[3] The principal community contour, which is the signal strength required to be placed over the city to which the television station is assigned, is that signal level which is sufficient to assure 90% of the receiving locations an acceptable signal 90% of the time. The Grade A contour is that level of signal intensity which is sufficient to provide an accepted signal to 70% of the receiving locations 90% of the time. The Grade B contour is the theoretical contour along which a good picture may be expected 90% of the time at only 50% of the locations. See Clarksburg Publishing Company v. Federal Communications Commission, 86 U. S. App. D. C. 211, 215-16, 225 F.2d 511, 515-16, citing FCC Sixth Report and Order. The Commission in its Third Notice of Proposed Rule Making, finalized in the Sixth Report and Order, recognized that a Grade B signal is not adequate to overcome urban noise present in built-up areas such as the Greater Muskegon Area (16 Fed. Reg. 3072). The Grade B contour of Station WWTV, Cadillac, Michigan, passes through only a very small portion (0.5 square miles) of North Muskegon and Muskegon (R. 95, 102).

signals of Stations WKZO-TV and WOOD-TV are poorer than would be expected on the basis of the theoretical FCC curves (R. 71-73, Tr. 247-256). Except for service from WZZM-TV, reception is unsatisfactory in most locations in the Greater Muskegon Area and because of the technical character of color transmissions, reception of color television programs is unsatisfactory in even a greater proportion of television homes (R. 71-73).

Recognizing the need and desire of the residents of the Greater Muskegon Area for improved and additional television service,[4] Appellant, in 1964, started plans to construct a CATV system in that area (R. 23) and actual operation of the system started in North Muskegon on March 4, 1966 (R. 31, 95). In addition to carrying the signals of Stations WZZM-TV, WOOD-TV, WKZO-TV, and WWTV, described above, the system carries the signals of Station WMVS-TV, a non-commercial educational station located in Milwaukee, Wisconsin, WTMJ-TV, WITI-TV,

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[4] The Commission has previously described the value to the public of CATV service in underserved areas, such as the Greater Muskegon Area, in its First Report and Order on CATV (30 Fed. Reg. 6039, 6044):

> 43. The public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception has led to the development of CATV systems, . . . [and] is proposed for communities with three full network services. The public in all areas has made clear its demand for good reception of multiple program choices. This desire and need must be recognized and fulfilled, to the extent practicable. It is one of the principal components of the public interest standard of the Communications Act. Indeed, it may be said that the development of CATV and other auxiliary means for distributing the signals of assigned stations to the public (something not envisioned at the time of the Sixth Report and Order) now makes possible the realization of some of the most important goals which have governed our allocations planning. The provision of at least four commercial program choices and an educational service to most parts of the United States, using auxiliary means where necessary may now be a feasible goal.

The Commission reaffirmed its view as to the value of CATV service in situations such as that presented here in paragraph 139 of the Second Report and Order, 31 Fed. Reg. 4540, 4562, 2 F.C.C. 2d 725, 781, adopting its current CATV rules.

and WISN-TV, all located in Milwaukee and WMAQ-TV, Chicago, Illinois[5] (R. 95). Thus, Appellant's CATV system provides subscribers with satisfactory reception of nine television stations instead of only one which could otherwise be satisfactorily viewed. The CATV system is currently in operation in Muskegon and North Muskegon, Michigan (R. 95). Neither service nor construction of the CATV system has commenced in any other portion of the Greater Muskegon Area (R. 34, Tr. 326-327).

II. The Rule Making Proceeding

Until April 23, 1965, when the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 30 Fed. Reg. 6078, 1 F.C.C. 2d 453, the FCC never attempted to assert jurisdiction over CATV systems, such as Appellant's, which rely solely upon off-the-air reception of television signals. During the pendency of the proceeding, no restrictions were imposed upon the construction or operation of CATV systems such as Appellant's.

On February 15, 1966, the Commission issued a decision in the form of a Public Notice (Mimeo No. 79927) (Appendix C), in which it announced for the first time that the FCC asserted jurisdiction over all CATV systems. For the immediate guidance of the public, it also described the substance of some of its new CATV rules. Under the terms of the February 15 Public Notice, Appellant was entitled to commence operation as a lawful system and without prior FCC approval.

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[5] These latter five signals are considered "distant signals" under the Commission's Rules. "The term 'distant signal' means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station." (See Section 74.1101(i) of the Commission's Rules). In other words, the five stations referred to above do not place a predicted Grade B signal over the community in which Appellant's CATV system is located.

On March 8, 1966, the Commission released its *Second Report and Order* in Docket No. 15971, adopting rules which became effective immediately upon publication in the Federal Register on March 17, 1966, 31 Fed. Reg. 4540, 2 F.C.C. 2d 725. In this document the Commission set forth the text of its new CATV rules. The terms of the February 15 Notice, insofar as it applied to Appellant, was, however, changed without explanation. This changed rule was made applicable retroactively to CATV systems that commenced operation after February 15, 1966. See Section 74.1107 of the Commission's Rules, 31 Fed. Reg. 4572. Appellant, however, had commenced operation of its system in North Muskegon on March 4, 1966, in reliance on, and in conformity with, the specific standard in the Public Notice of February 15, 1966, and before the Commission changed the rule in its *Second Report and Order*. It began operation in Muskegon on April 15, 1966 (R. 95), since even the rules adopted on March 8, 1966, permit an existing system to commence operation in new areas so long as the new operation is not in a new geographical area. See Section 74.1107(d) of the Commission's Rules, 31 Fed. Reg. 4572 (1966). The authority to expand operations in Muskegon as an existing system stemmed, however, from the authority granted by the February 15 Notice to commence operation as a lawful system without further FCC approval.

III. Show Cause Proceeding

On April 20, 1966, the Commission, by telegram, first raised a question of possible impropriety in the operation of Appellant's CATV system (R. 1-3). Appellant is a long-time licensee of the Commission,[6] whose record of performance in the public interest is without blemish. It is not contumacious, and, in its reply of April 28, 1966, to the telegram, Appellant promptly stated that if it was determined that the rules were valid as

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[6] It presently is the licensee of the following broadcast stations: WABQ, WXEN-FM, Cleveland, Ohio; WTOD-AM-FM, Toledo, Ohio; WIBM-AM-FM, Jackson, Michigan; WIOU, WKMO (FM), Kokomo, Indiana; WJLB, WMZK (FM), Detroit, Michigan; WJVA-AM-FM, South Bend, Indiana; and WSGW, Saginaw, Michigan (R. 20-21).

applied to its system,[7] it would file an appropriate request for waiver of the rule and abide by any Commission decision thereon. Appellant also sought special authority to remain on the air on a temporary basis until a final determination would be made by the Commission (R. 4-7).

On May 13, 1966, the Commission issued an Order to Show Cause directing Appellant to show cause why a cease and desist order should not be issued against Appellant's CATV system to the extent that Appellant was bringing into Muskegon and North Muskegon the television signals of four Milwaukee stations and one Chicago station, all beyond their Grade B contours (R. 8-12). The Commission refused, however, to pass on the merits of Appellant's request for interim relief, holding that the arguments in support of the request for temporary operating authority were not properly before the Commission and would only be adjudicated if made in connection with a Petition for Waiver of the requirements of Section 74.1107 (R. 10).

The Commission designated the matter for hearing on an expedited basis, eliminated the customary initial decision, and required that the Hearing Examiner certify the record to the Commission for final decision and that the parties file Proposed Findings of Fact and Conclusions of Law within seven calendar days after the date the record was closed.

On June 10, 1966, Appellant, in accordance with the statement in the Order to Show Cause, filed a Petition for Waiver and Other Appropriate Relief (R. 226-326) in which Appellant urged that it should be relieved of the requirements of Section 74.1107 of the Commission's Rules if they were held to be validly applicable in this situation. The Petition for Waiver also renewed the request for temporary authority to continue

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[7] Appellant indicated that it was in violation of the terms of Section 74.1107 of the rule, but contended that the rule as applied to it was arbitrary and invalid in that the proper cut-off date for the legality of its operation as a system should be March 17, 1966, rather than February 15, 1966, and since its operation commenced prior to March 17, 1966, its operation should not be deemed illegal or improper.

the operation of its CATV system until the Commission had the opportunity to pass on the merits of the Petition for Waiver (R. 258-261). It sought temporary authority only in Muskegon and North Muskegon, where service to the public was already in existence.

On the same date, Appellant also filed a Petition for Simultaneous Decision, requesting the Commission to pass upon the merits of its pending Petition for Waiver to authorize the importation of "distant signals" by its Greater Muskegon Area CATV system at the same time as it passes on the merits of the cease and desist proceedings (R. 220-225). It requested at any event that no final decision be issued in the cease and desist proceeding prior to the final action on its Petition for Waiver and Request for Final Authority. Further, Appellant requested expedited action of the waiver request. Its Petition stated (R. 222):

> It is requested that action on the merits of its Petition be expedited so that a determination may be made on the merits of the Petition prior to the final determination of the Show Cause proceedings in Docket No. 16,635, regardless of the action taken on the Request for Interim Relief. Favorable action on this Petition will make moot the question whether a Cease and Desist Order should be issued.

A prehearing conference was held in the Show Cause proceeding on June 6, 1966, and the hearing was held on June 16 and June 17, 1966. The only parties who participated were the Appellant and the Commission's Broadcast Bureau.

During the hearing, Appellant contended that, under Section 312(c) of the Communications Act, 47 U.S.C. 312(c) and Section 1.91(e) of the Commission's Rules, 47 C.F.R. 1.91(e), the Commission was required to consider certain evidence in order to determine whether a cease and desist order should be withheld until its requests for temporary or permanent authority were acted on.[8] The Hearing Examiner received the

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[8] In addition, Appellant contended that under the circumstances it was unlawful for the Commission to deprive Appellant of the benefit of the Examiner's initial decision or an initial decision of the Commission en banc prior to issuance of a final decision.

evidence holding it was relevant and admissible (Tr. 71-72). In its defense, Appellant first contended that even if Section 74.1107 was held to be generally valid, it could not be lawfully applied to Appellant because of the singular factual situation in which Appellant found itself as a result of the fact that it inaugurated CATV service after February 15, 1966, and before March 8, 1966, and was led by the Commission's Public Notice of February 15, 1966, to believe that it would be entirely proper for it to do so. Appellant also contended that, even if it is determined that Appellant's operations are contrary to the rule, the Commission should exercise its discretion under Section 312(c) of the Communications Act by withholding the issuance of a cease and desist order until it could decide whether to authorize Appellant's operation since, based on the evidence adduced in the hearing, there was no need to cut off the existing valuable and needed service, which was demonstrated to be in the public interest, during this interim period.

By decision (R. 203-218) released on July 18, 1966, the Commission ordered Appellant to cease and desist from importing "distant signals" over its CATV system in Muskegon and North Muskegon. The Commission rejected Appellant's contentions as to the validity of the new CATV rule as applied to Appellant's operation, since it failed to admit that Appellant was affirmatively misled into commencing operation by the Public Notice of February 15, 1966. Thus, it concluded that the only issue in the proceeding was whether the Appellant was violating the rule and since it was in violation of the terms of the rule,[9] the cease and desist order must be issued. In reaching this result, it refused to consider Appellant's evidence, described below, reversing the Hearing Examiner and holding

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[9] The Commission found that Appellant had commenced operation after February 15, 1966, in North Muskegon and Muskegon and that it was importing the signal of four Milwaukee stations and one Chicago station beyond the Grade B contours of the originating stations in violation of Section 74.1107, since Grand Rapids — Kalamazoo is the 38th largest television market in the country and the CATV system was located within the Grade A contour of one television station in Grand Rapids. Appellant had stipulated to these facts prior to the commencement of the hearing (R. 94-96).

that this evidence should have been excluded. It further rejected Appellant's contentions concerning the validity of the expedited procedure. The Commission failed to consider Appellant's requests for temporary operating authority, simultaneous decision or expedited consideration of its request for appropriate authority. This appeal followed.

On August 2, 1966, Appellant filed a Petition for Stay requesting this Court to stay the effectiveness of the Commission's decision so as to permit Appellant to continue its existing CATV service until such time as the Court would hear and determine the merits of the appeal or the Commission would consider and decide Appellant's request for Commission approval of its CATV operation, whichever was sooner. The Commission stayed the effectiveness of its own decision pending a decision on Appellant's request for stay filed with the Court. By Order and Memorandum dated September 16, 1966, the Court stayed the Commission's decision pending final disposition of the case. On September 22, 1966, the Commission sought reconsideration of the stay and on September 26, 1966, Appellant filed an opposition. By Order dated October 3, 1966, the Court denied the Commission's request for reconsideration.

STATUTES AND RULES INVOLVED

The relevant portions of the Statutes and Rules involved are set forth in Appendix A to this brief, with the exception of the new Community Antenna Television Rules adopted by the Federal Communications Commission which are set forth in Appendix B.

STATEMENT OF POINTS

1. Where the Commission in its February 15, 1966 Public Notice informed the Appellant that the proposed operation of its CATV system would be lawful and would not require prior FCC approval and Appellant commenced operation of the system lawfully and in reliance upon the Public Notice before the Commission changed the provisions thereof, the

Commission cannot, without hearing or further rule making proceedings, apply its changed rule to Appellant's operation.

2. The Commission was required, under the unusual and singular circumstances of this case, to consider Appellant's requests for legitimation of its operation prior to the issuance of the cease and desist order.

3. The Commission erred in excluding evidence in support of Appellant's request that no cease and desist order should be issued pending disposition of Appellant's request for legitimation, particularly since Appellant's operation was lawful when commenced.

4. The Commission erred in depriving Appellant of the Hearing Examiner's Initial Decision or a tentative decision of the Commission prior to the issuance of the final decision.

SUMMARY OF ARGUMENT

I

The Commission's top 100 market rule adopted March 8, 1966, cannot be lawfully applied to Appellant's CATV operation without a hearing or further rule making proceedings. The Commission, in its February 15, 1966, Public Notice, informed the Appellant that its proposed operation of its CATV system would be lawful and would not require prior FCC approval and thereafter Appellant commenced operation of the system in good faith reliance on that Public Notice. The Commission later retroactively changed the standard announced in the Public Notice — a fact which the Commission refused to admit in its Decision — and applied it to Appellant's operation notwithstanding the fact that such operation was lawful when commenced. Thus, the Commission held that Appellant's operation was now unlawful and that Appellant must therefore stop importing "distant signals." The Commission cannot validly apply its changed rule to Appellant's operation because such action would constitute an illegal retroactive application of the rule, particularly since the Commission affirmatively misled the

Appellant into commencing operations. Even assuming that the Commission had the power to apply its changed rule to Appellant's operation, it certainly could not do so without first conducting a further rule making proceeding in accordance with the requirements of Section 4 of the Administrative Procedure Act or an *ad hoc* evidentiary type hearing at which Appellant could be heard.

II

Even if the Commission's top 100 market rule adopted March 8, 1966, may lawfully be applied to Appellant, the Commission nevertheless erred in its issuance of the cease and desist order since the Commission refused to consider Appellant's requests to permanently or temporarily legitimize its operation which were pending at the time the cease and desist order was issued. The Commission's action in issuing its cease and desist order prior to consideration of Appellant's request for temporary authority is squarely contrary to the decision of this Court in *C. J. Community Service, Inc. v. Federal Communications Commission*, 100 U.S. App. D.C. 379, 246 F. 2d 660. In that case the Court clearly held that a cease and desist order could not be issued until after the Appellant had been afforded a genuine opportunity to legitimize its operation by procuring temporary operating authority pending the ultimate determination on the permanent legitimation of that operation. Since the Commission invited Appellant here to commence operation on the representation that its operation would be entirely lawful, it cannot now insist that appellant stop this operation in order to obtain consideration of its request for permanent operating authority. The Commission is required at least to consider the request for temporary authority before it requires cessation of the operation, particularly where Appellant has shown that continued operation of its CATV system would be in the public interest and that no member of the public or any broadcast station could be hurt in the interim period.

III

The Court, in *C. J. Community*, *supra*, held that a cease and desist order may not be predicated on the finding of violation alone if the Commission has refused to consider the facts and circumstances possibly extenuating the Respondent's actions and showing service should be temporarily maintained. The Commission's action in this case is in direct violation of the holding in *C. J. Community*. This is not a case where, having considered all the circumstances, the Commission has decided in its discretion to issue a cease and desist order, but it is rather a case where the Commission has decided before considering the evidence that it will not use the discretion entrusted to it by Congress. The Commission here erroneously reversed its Hearing Examiner and held that almost all of the evidence introduced by Appellant should have been excluded with the effect that Appellant was permitted to make no defense. The Appellant demonstrated a need for the service and tendered a substantial justification, in terms of the express provisions of the FCC regulations and announcements, for actions taken in both North Muskegon and Muskegon prior to FCC clarification of its announcements or rules. Under these circumstances, it was plainly improper for the Commission to refuse to even consider Appellant's evidence going to its actions, intentions, and good faith, as well as to the substantial public interest factors favoring continued operation, particularly since the FCC regulations and announcements gave Appellant reason to believe that its actions were lawful when taken and under the FCC's forthcoming regulations.

IV

The Commission improperly deprived Appellant of an Initial Decision. The Communications Act requires that in every case of adjudication the person conducting the hearing shall issue an Initial Decision except where the Commission finds upon the record that due and timely execution of its functions *imperatively* and *unavoidably* require that the record be certified to the Commission for initial or final decision. The findings

and observations of the Commission in this case do not support the determination that the omission of an Initial Decision was imperative in this case, particularly in view of the Commission's long delay in taking action in the CATV field and its existing rules which permit CATV operations to continue in varying circumstances. The omission of the Examiner's report deprived Appellant of a full and fair hearing to which it was entitled. The Appellant was totally deprived of any opportunity to address itself to any initial or tentative conclusion and was forced, instead, to seek initial relief in the Courts. Appellant was also deprived of the benefit of the Examiner's observations of the demeanor of Appellant's witness which was of prime importance under the circumstances of this case which involved elements of credibility and good faith of the witness with respect to the events which have transpired.

ARGUMENT

I. THE COMMISSION'S TOP 100 MARKET RULE IS INVALID AS APPLIED TO APPELLANT BECAUSE THE COMMISSION AFFIRMATIVELY MISLED APPELLANT INTO COMMENCING OPERATIONS

Even if the Commission's top 100 market rule (Section 74.1107) is valid as to the general public, it cannot be lawfully applied to Appellant's CATV operations in the Greater Muskegon Area without a hearing or further rule making proceedings because the Commission affirmatively misled Appellant concerning the legitimacy of its CATV operation when it first started service to the public. It is well established that a law or regulation, apparently valid on its face, may be invalid in its operation in a particular factual setting. *Yick Wo v. Hopkins*, 118 U.S. 356; *Griffin v. People of the State of Illinois*, 351 U.S. 12.[10] It is the

[10] The question of the validity of a rule is, of course, properly in issue when it is applied to a person in a particular factual setting. Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F. 2d 543, cert. denied, 361 U.S. 813; Columbia Broadcasting System v United States, 316 U.S. 407, 421.

purpose of this section of the brief to demonstrate that Section 74.1107 is invalid as applied to Appellant in the unusual and singular circumstances of this case.

A. EVENTS BEFORE FEBRUARY 15, 1966

Initial planning for the institution of a CATV service in the Greater Muskegon Area took place in 1964 (R. 23). Prior to February 15, 1966, Appellant had already received a franchise and license to operate its CATV system in various communities in the Greater Muskegon Area, including Muskegon and North Muskegon[11] (R. 94). Appellant had made substantial financial expenditures and commitments in connection with this CATV system. Prior to February 15, 1966, Appellant had expended $91,549.61 and had committed itself to the expenditure of an additional $127,050.00 in connection with the construction of the Greater Muskegon Area CATV system (R. 81-82). By that date, it had also entered into a five year contract with the General Telephone Company of Michigan to lease 403 miles of cable at a cost of $768.00 per mile each year, constituting a total commitment to the telephone company of $1,547,520.00 (R. 83).

The agreement with the telephone company to supply distribution cable in North Muskegon and Muskegon was entered into on August 25, 1965 (R. 25-26). The installation of trunk and distribution cable in North Muskegon was completed by January 14, 1966, and in a portion of Muskegon by March 3, 1966 (R. 26, 27).

Prior to February 15, 1966, Appellant had requested the telephone company to install 70 customer connections (known in the industry as "dead drops") in North Muskegon, and 36 of these were in fact installed prior to February 15, 1966 (R. 26). The only reason why actual CATV

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[11] Appellant received a 25-year franchise from North Muskegon on August 23, 1965 and a license for an indefinite period of time from Muskegon on September 7, 1965.

service was not instituted prior to February 15, 1966, was that construction of the tower was unforeseeably stalled because of an unusually long delay in obtaining Federal Aviation Agency (FAA) approval for the proposed 403-foot tower on the proposed site. Appellant had requested FAA approval of the proposed tower on November 29, 1965, and final FAA approval was not issued until February 25, 1966. Consequently, the tower was not completed until March 3, 1966. (R. 26). Receiving (head end) equipment, however, was installed and ready for operation before February 15, 1966.[12] (R. 26).

Appellant had obligated itself and made commitments to the people residing in North Muskegon and Muskegon to provide CATV service and had made strong representations that it would import "distant signals" — signals of stations providing less than a Grade B signal to the area. In addition, Appellant committed itself and made representations to the local authorities in North Muskegon and Muskegon that it would carry these "distant signals." (R. 28-29, 31, 36-37, 58-60).

Even prior to completion of construction, Appellant began to receive and accept applications for service (Tr. 337) from persons residing throughout the Greater Muskegon Area, most of the applications being accompanied by a check or cash deposit (R. 59). Appellant received and accepted a total of 179 applications, including 81 applications from persons residing in North Muskegon and 67 applications from persons residing in Muskegon prior to February 15, 1966 (R. 59).

Wide publicity of the proposed CATV system appeared in *The Muskegon Chronical*, a local daily newspaper serving the Greater Muskegon Area, during the late summer and early fall of 1965. These articles talked in terms of establishing a CATV system to serve the entire Greater Muskegon Area and also indicated that service would include the carriage of signals ("distant signals") not previously available

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[12] There is only one head end which is intended to feed the trunk cable throughout the Greater Muskegon Area (R. 26, 77).

to the area without the facilities of a CATV system. The articles further pointed out that the system would provide better reception of the stations already received in the area and that it would also substantially improve color reception (R. 28). Appellant made plans for an extensive advertising campaign in early January 1966. Twelve separate advertisements had appeared in *The Muskegon Chronicle* by March 17, 1966, the first one appearing on February 3, 1966. All of these advertisements stressed the fact that a large number of so-called "distant signals" would be offered over the CATV system (R. 28-29).

B. APPELLANT'S RELIANCE UPON THE COMMISSION'S NOTICE OF FEBRUARY 15, 1966

As we have pointed out above, prior to February 15, 1966, the Commission had no general scheme for the regulation of CATV systems and had up to that time never even asserted jurisdiction over CATV systems, such as Appellant's, which pick up all signals off the air. It was, however, generally known that some type of FCC action was imminent and to guide members of the public as to how they should proceed, even before the text of a Report and Order was adopted or released, the Commission on February 15, 1966 issued decision in the form of a Public Notice (Mimeo No. 79927) entitled "FCC Announces Plan for Regulation of All CATV Systems." In that Public Notice the Commission stated that it had adopted new rules to govern CATV operation, the text of which would be subsequently incorporated in a Report and Order, and in this connection it asserted, for the first time, that it had jurisdiction over all CATV systems. With respect to the carriage of "distant signals" the Commission's Public Notice stated that persons with CATV systems in the 100 highest ranked television markets (according to American Research Bureau statistics) who proposed to extend the signals of television stations beyond their Grade B contours would be required to obtain FCC approval before CATV service to subscribers could be commenced. The Commission further stated that an evidentiary hearing would be

required as to all requests for such FCC approval, unless a waiver of the hearing requirements was granted. This aspect of the Commission's decision was made effective "immediately" and was stated to be applicable to all CATV operations commenced after February 15, 1966.

The Notice carefully defined how it would be determined whether a CATV system was located in a top 100 market. The Commission stated (Notice, p. 2):

> The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of *all existing television stations* in that market. (Italics added.)

The purpose of the Notice was to inform CATV operators that if their system was located within the Grade A contour of *all* of the television stations in a top 100 market and if "distant signals" were to be carried, they should not commence operations after February 15, 1966 since such "distant signals" could not be carried without prior FCC approval after hearing. On the other hand, the clear meaning of the Notice was that if the CATV was not within the Grade A contour of *all* the existing stations in the market, the hearing requirement would not be applicable and the system would be treated as all other systems outside the top 100 markets.[13]

Moreover, there was nothing about this original rule which would have put the public on notice that it was likely to be changed. On the contrary, the original rule appeared to fully effectuate the policy which was

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[13] In this connection, the Commission explicitly stated in the Public Notice that its prior approval would not be required for CATV systems outside the top 100 markets (Notice, p. 2).

announced in the February 15 Notice: to proceed with caution in the CATV field where UHF stations might be prejudiced by CATV operation. It is well known that UHF stations have less coverage than VHF stations and there would be no point in prohibiting CATV operations where the UHF stations did not reach the CATV area. The rule adopted February 15 achieved this aim by permitting new CATV operations where only the greater coverage of VHF stations reached the CATV system; only if all the stations had a Grade A contour over the CATV system was the hearing required.

Immediately upon receipt of the February 15, 1966 Notice, Appellant, through its chief supervisory officer, Edward Clark, who is a professional engineer, reviewed the proposed CATV operation in the Greater Muskegon Area in light of this Notice (R. 29-30; Tr. 83). Mr. Clark, using the Commission's standards, computed the predicted contours of all the existing television stations located in the combined Grand Rapids-Kalamazoo television markets, which is ranked by American Research Bureau as the 38th largest television market in the country (Tr. 153, 248). Mr. Clark determined that the Greater Muskegon Area was *not* located within the Grade A contours of *all* the existing television stations in the combined Grand Rapids-Kalamazoo television market. Station WKZO-TV (Channel 3), Kalamazoo, and WOOD-TV (Channel 8), Grand Rapids, placed a predicted Grade B coverage contour over Muskegon, but not a Grade A contour (R. 30, 95, 97-102). Mr. Clark noted that the CATV system was located within the Grade A contour of only *one* television station in the Grand Rapids-Kalamazoo market, *i.e.*, Station WZZM-TV, Grand Rapids. He concluded, on the basis of the unequivocal language of the Notice, that the Commission's new top 100 market rule would not affect the CATV operation in the Greater Muskegon Area (R. 30; Tr. 141, 306, 310-311).

There being no present or future impediments to the commencement of operation, Appellant proceeded to all steps required for the institution

of CATV service in the Greater Muskegon Area (R. 30). Appellant took no unusual steps to accelerate the institution of service and conducted its business in a normal manner (Tr. 154).

C. EVENTS AFTER FEBRUARY 15, 1966: THE UNEXPLAINED AND UNEXPECTED CHANGE IN THE TOP 100 MARKET RULE

The Commission's new CATV rules were released on March 8, 1966, published in the Federal Register on March 17, 1966 (31 Fed. Reg. 4540) and made effective on the latter date.

Since the Commission in its February 15, 1966 Public Notice informed the Appellant that the proposed operation of its CATV system would be lawful and would not require prior FCC approval, Appellant commenced service in North Muskegon on March 4, 1966, one day after the tower was completed, in reliance on the specific standard contained in the Public Notice.[14] Thus, the operation was completely consistent with the standard announced by the Commission in its February 15, 1966 Public Notice and, therefore, entirely lawful when it started. Approximately 124 subscribers were receiving service by March 17, 1966 (R. 95).

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[14] Booth intended to start CATV service in Muskegon on the same date that service was commenced in North Muskegon, i.e., March 4, 1966 (R. 31). By March 3, 1966, cable was installed in substantial portions of the City of Muskegon and ready to be connected to the subscribers' television sets (R. 31, 57, Tr. 86-87). The only matter that needed completion in order to start service in Muskegon on March 4, 1966, was the laying of cable under the Causeway which separates North Muskegon from Muskegon. Since the Telephone Company determined that it was not feasible to place cable above the Causeway, it decided to install a special underground conduit system, using a double-jacketed cable. The Telephone Company ordered the special underground cable on December 30, 1965, and requested a shipping date of January 15, 1966. The supplier of the cable advised the Telephone Company that the earliest shipping date possible was March 1, 1966. However, the cable was not received by the Telephone Company until mid-March, 1966. This delay in receiving the special underground cable and the time consumed in installing it caused the delay in the institution of service in Muskegon (R. 31-32, 54, 55, Tr. 327). Aside from the problem of laying the underground cable, CATV service was ready to commence in Muskegon on March 4, 1966, and commitments for service to the subscribers were made prior to that time (R. 32, 59, 60, Tr. 327). CATV service was, in fact, instituted in Muskegon on April 15, 1966 (R. 32). Under Section 74.1107(d), 31 Fed. Reg. 4572 (1966) of the Commission's Rules and pronouncements issued prior to April 15, 1966, authorized systems are permitted to expand in the same geographical area without prior FCC approval.

Additionally, the total number of applications for service accepted from various persons residing in North Muskegon increased from 81 as of February 16, 1966 to 163 as of March 17, 1966. During the same time period, the total number of applications accepted from persons residing in Muskegon increased from 67 to 180. Similarly, the number of service applications accepted from persons residing in other portions of the Greater Muskegon Area increased from 29 on February 16, 1966 to 77 on March 17, 1966 (R. 59). Furthermore, subsequent to February 15, 1966, Appellant expended $31,618.39 in addition to the amounts previously expended for the CATV operational expenses (R. 82), and continued to advertise and represent that it would provide the public with "distant signals" by means of the CATV system (R. 29).

The terms of the February 15, 1966 Notice becomes critical in this case because between February 15, 1966 and March 8, 1966 the Commission changed its mind as to how it would apply the top 100 market rule. Whereas its Notice had stated that the hearing requirements would be applicable if the CATV system was within the Grade A contours of *all* the stations in the market, the rules adopted on March 8, 1966 and made effective March 17, 1966 imposed the hearing requirement if the CATV system was within the Grade A contour of *any* station in the market.[15] Neither the Report and Order of March 8, 1966 nor any other Commission document has explained that change in the rule. The Commission did absolutely nothing whatsoever between February 15, 1966, and March 8, 1966, to alert the public that it was even contemplating a change in the rule, much less the manner in which the rule would be changed and, therefore, there was no reason to anticipate that such a change was forthcoming.

[15] Section 74.1107 of the Commission's Rules, which was adopted on that date, provided, in pertinent part:

> (a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consisistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. (Emphasis added.)

D. THE COMMISSION MAY NOT PROPERLY APPLY ITS CHANGED TOP 100 MARKET RULE TO APPELLANT WHERE APPELLANT COMMENCED OPERATION CONSISTENT WITH THE STANDARD THEN IN EFFECT AND IN A LAWFUL MANNER

The Commission in its decision has failed to admit, with the candor which would be expected of a governmental body, that there was a change in the scope and applicability of the rule. By claiming in its decision (Par. 13) that it was a "possible if not probable" interpretation of the February 15, 1966 Public Notice that the hearing procedure would apply if the CATV system was located within the Grade A contour of *any* television station in the market, the Commission seeks to avoid the otherwise inescapable determination that Appellant was affirmatively misled into commencing operation with the innocent belief that the new FCC top 100 market rule, when released, would not apply to its CATV operation in the Greater Muskegon Area. The Court, however, is required to decide whether any interpretation other than the one placed upon it by Appellant was reasonable or, indeed, possible since the answer to this question is vital to the consideration of (1) whether the March 8, 1966 rule is valid as applied to Appellant and (2) whether a cease and desist order should have been issued without prior consideration of Appellant's request for temporary or permanent operating authority based, in part, on the misleading character of the February 15, 1966 Public Notice. (See Part II, *infra*.)

In summary, the Commission in its February 15, 1966 Public Notice informed the Appellant that its proposed operation of the CATV system would be lawful and would not require prior FCC approval and thereafter Appellant commenced operation of the system in good faith reliance on that Public Notice before the Commission changed the provisions of the Notice. The Commission applied the changed rule to Appellant's operation and held that such operation was unlawful and, therefore, that Appellant must stop importing "distant signals." The most critical fact, of course, is that Appellant *did start service* on March

4, 1966, in reliance on, and in conformity with, the February 15, 1966, Public Notice. If the standard in the Public Notice had been the same as the one announced in the *Second Report and Order*, Appellant would not have started service. The fact that Appellant made plans for the institution of its CATV service, including the expenditure and commitment of substantial funds and the securing of local franchises, prior to February 15, 1966 in no way detracts from the injury to Appellant from the February 15, 1966 Public Notice. The injury to Appellant was that it commenced service, thus holding out to the public that it would and could render the service which it had heretofore contemplated and planned.[16] Moreover, the Commission itself recognized the importance of institution of service and the injury that would flow from later withdrawal of such service when it selected the date of institution of service as the critical fact in determining whether a CATV system would be permitted to operate in the top 100 markets without FCC approval. The Commission would now have the Appellant return to the public and inform it that the operation must terminate for an indefinite time because it is illegal. The application of its changed rule to the Appellant's operation, under the unusual and singular circumstances of this case, plainly constitutes an illegal retroactive application of the rule and is contrary to all notions of due process and basic fairness.

If the standard announced by the Commission in its Public Notice of February 15, 1966 had been precisely the same as the standard adopted in Section 74.1107, the Commission might find it possible to argue that in no sense is its rule being applied retroactively. However, it is not

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16 The general public would be concerned if the business opened and offered its service to the public and then was forced to close down or terminate the service, in whole or in part, because it was alleged to be operating illegally. Such action would inevitably destroy the business reputation of the business enterprise in the eyes of the public.

necessary to reach or decide that question here,[17] because the standard announced on February 15, 1966 did differ from that finally adopted by the Commission, and this difference affirmatively misled Appellant into taking the actions which the Commission now seeks to have terminated.

The "inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the Act, and who was unable to know, when it acted, that it was guilty of any conduct" which the Commission would seek to prohibit, is manifest. *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F.2d 141, 149 (9th Cir., 1952). The Court of Appeals in that case reversed the NLRB, holding that subjecting a person to sanctions for activity which, when undertaken, could not reasonably be foreseen as improper or illegal is the type of activity "which the law abhors." See 195 F.2d at 149. This principle is particularly applicable here, because the Commission in its February 15, 1966 Public Notice affirmatively misled Appellant by announcing a specific standard to govern future conduct and on which it knew parties would rely.[18] *Cf., Van Aalten* v. *Hurley*, 176 F. Supp. 851 (S.D.N.Y., 1959).

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[17] The Rule adopted in the Second Report and Order would be an unlawful retroactive law even if it did not change the earlier announced standard. Absent extraordinary circumstances, courts view unfavorably any rule which is made applicable to events occurring prior to the date on which the rule is adopted. Generally, retroactive rules are allowed only when specifically authorized by statute. 1 Davis, Administrative Law 341 (1958); Arizona Grocery Co. v. Atchison, Topeka and Santa Fe RR., 284 U.S. 370, 389-390 (1932); Litton Industries v. Renegotiation Board, 298 F. 2d 156 (4th Cir., 1962). Commissioners' Bartley and Loevinger in their dissenting statement to the decision here on appeal stated their position that the February 15, 1966 cut-off date was a retroactively applied effective date and that the rule was therefore invalid.

[18] Indeed, the Commission in the Show Cause Order in this proceeding relies on the February 15, 1966 Public Notice as providing the public, including Appellant, with notice of the Commission's policy concerning the importation of "distant signals" in the 100 largest markets. Likewise, the Commission, in its Memorandum Opinion and Order denying petitions for stay of the effective dates of the Second Report and Order (FCC 66-456, released on May 27, 1966), 3F.C.C. 2d 816 noted that the February 15th Public Notice was intended to give notice to the public of the substance of the CATV rules.

Thus, it is clear that, even if the rule is valid on its face, it would be invalid if applied to Appellant's operation. No notions of due process or basic fairness would permit the Commission to apply its changed standard announced in the *Second Report and Order* retroactively against a person who commenced operations in good faith and in complete conformity with a sepcific standard previously announced by the Commission. To apply the rule here would approve the entrapment of an unsuspicious CATV operator in violation of all principles of fair play and due process. The Commission is estopped from applying the changed standard in the *Second Report and Order* to the Appellant's CATV operation because of the "misleading circumstances" it created in this case. *Cf.*, *Moser* v. *United States*, 341 U.S. 41 (1951).

E. THE COMMISSION CANNOT, WITHOUT FURTHER RULE MAKING OR HEARING, APPLY ITS CHANGED RULE TO APPELLANT'S OPERATION

Even assuming that the Commission has the substantive power to apply its changed rule to Appellant's operation, it certainly could not do so without first conducting a further rule making proceeding in accordance with the requirements of Section 4 of the Administrative Procedure Act or an *ad hoc* evidentiary type hearing at which Appellant could be heard. The failure of the Commission to follow either of these procedures deprived Appellant of its procedural rights and constitutes reversible error.

Section 4(a) of the Administrative Procedure Act requires administrative agencies to give advance notice of "either the terms of substance of the proposed rule or a description of the subject and issues involved." The requirement of notice is essential to effectuate the scheme embodied in the Administrative Procedure Act whereby the rule making process will include opportunity for interested persons to "participate in the rule making through submission of written data, views, or arguments" to the end that such views will be considered by the agency.

Section 4(b) of the Administrative Procedure Act. While the agency need not follow suggestions made by the public, it must, pursuant to Section 4(b), "incorporate in any rules adopted in concise general statement of their basis and purpose . . . after consideration of all relevent matter presented." The Commission gave no such notice or opportunity for public participation prior to the change on March 8, 1966 in the substantive provisions of its top 100 market rule, all in direct violation of the requirements of the Administrative Procedure Act.

The Commission's decision embodied in the Public Notice of February 15, 1966, clearly adopted specific substantive CATV rules, including the rule pertaining to the importation of "distant signals" into the 100 largest television markets. With respect to the major market policy, the Commission stated "this aspect of the Commission's decision is effective immediately and will be applicable to all CATV operations commenced after February 15, 1966." (Notice, p. 2). The Notice was intended to set forth definite standards in order to provide immediate guidance to the public and, of course, upon which the public was expected to act.[19] Additionally, the fact that three Commissioners attached their separate statements and viewpoints concerning the Commission's action taken in the Pulic Notice clearly demonstrates the significant nature of the decision contained therein. Indeed, Commissioner Cox, in his separate statement, specifically referred to the matters contained in the Notice as constituting "Commission action."

As previously shown, in its *Second Report and Order*, released on March 8, 1966, the Commission made a substantial change in the standard announced in the February 15 Public Notice. The Commission did not, however, utilize the procedures which the Administrative Procedure Act requires it to follow before the adoption of new substantive rules. Instead of informing the public of its proposed change in the rule and

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[19] See also n. 18, supra.

alleviating whatever prejudice might result from persons relying on the rule announced in the February 15 Public Notice, the Commission said nothing. Consequently, the public had no opportunity to comment on the proposed rule change or to point out the impact of the change on CATV operations which started lawfully on the basis of the February 15, 1966 decision. Thus, the change in the rule, accomplished without the requisite rulemaking procedures, is patently violative of the notice requirements of Section 4 of the Administrative Procedure Act. *Cf.*, *Owensboro On the Air* v. *United States*, 104 U.S. App. D.C. 391, 262 F.2d 702, *cert. denied*, 360 U.S. 911; *American Trucking Association* v. *United States*, 344 U.S. 298.[20]

Even if the Commission's altered rule is valid as to others who had taken no action in reliance upon the February 15 rule, before the new rule may be applied to Appellant's operation the Commission must, at a very minimum, provide the Appellant with an *ad hoc* hearing at which it can be heard on the question of whether the rule should be applied to it. *Federal Communications Commission* v. *National Broadcasting Co., Inc., (KOA)*, 319 U.S. 239 (1943). In that case the Supreme Court held that before the Commission could modify its rules on an *ad hoc* basis so as to deprive an individual licensee of what had been assigned to it under the rules, it must afford the licensee with a full evidentiary hearing in which it could show cause why the modified rule should not apply to it. Thus, the Court stated (319 U.S. at 246):

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[20] Leaving aside the requirements of the Administrative Procedure Act, the Commission had an independent duty to inform the public of the fact that it had changed its mind on the provisions of the top 100 market rule as soon as it decided to make the change. Its failure to do so was prejudicial to the position of private parties and the public who had no reason to anticipate that the Commission would retroactively change its rule. The situation in the present case is a good example of how the Commission's silence on this matter caused prejudice to a party relying on the first announced rule. Administrative "good faith," upon which so much of good government must necessarily rest, requires no less and the Court itself should impose the obligation upon the Commission in the exercise of its review functions here.

> "A licensee cannot show cause unless it is afforded opportunity to participate in the hearing, *to offer evidence*, and to exercise the other rights of a party." (Emphasis added.)

This doctrine equally is applicable under the circumstances of the instant case. The Commission, by a change in its rules, sought to prohibit the Appellant from continuing an operation which was entirely lawful when commenced. The failure of the Commission, however, to accord Appellant with an opportunity to offer evidence in the context of an appropriate hearing, prior to the application of the changed rule to its operation which was lawful under the pre-existing standard announced by the Commission, is contrary to law and resulted in a serious deprivation of Appellant's procedural rights. (See also p. 38, n. 30, *infra*)[21]

II. THE COMMISSION ERRED IN FAILING TO CONSIDER APPELLANT'S REQUESTS FOR LEGITIMATION OF ITS OPERATION PRIOR TO THE ISSUANCE OF THE CEASE AND DESIST ORDER

If the Commission may not, for the reasons set forth in Section I, apply the revised rule to Appellant, the cease and desist order must be

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[21] Cf., Southwestern Cable Co., et al. v. United States of America and Federal Communications Commission (Case No. 21183), decided August 23, 1966, in which the Court of Appeals for the 9th Circuit stayed a decision of the Commission issued in another CATV proceeding. In that case, without a hearing, the Commission had ordered certain CATV companies operating in San Diego, California, to refrain from delivering the signals of Los Angeles stations which were not "distant signals" into new areas in which they had not been operating on February 15, 1966, pending a hearing on the merits of their operations. In issuing the interlocutory injunction, the Court expressly noted that the future expansion sought to be restricted was lawful under existing Commission rules (a fact conceded by the Commission) and recognized that substantial inequities and irreparable injury to the CATV operators would result from the Commission's summary order stopping the otherwise lawful operation pending a hearing on the merits of whether the rule should be modified insofar as the specific CATV operation there was concerned. There, as here, the CATV systems were not afforded any type of hearing prior to the Commission's "stop order" so that the particular circumstances and public interest considerations could be evaluated. A copy of the Southwestern order was lodged to the Clerk of this Court during oral argument on the stay motion.

set aside. However, even if the rule may lawfully be applied to Appellant, the Commission nevertheless erred in its issuance of the cease and desist order since the Commission refused to consider Appellant's request to legitimize its operation, which was pending at the time the cease and desist order was issued. The Commission has not acted upon Appellant's request for temporary operating authority and, indeed, the decision below does not even refer to its existence. Moreover, the Commission has thus far failed to act on the Petition for Waiver and it has not noted, let alone considered in its final decision, the Petition for Simultaneous Decision or the request for expedited action.[22]

The Commission's action in issuing the cease and desist order prior to consideration of Appellant's request for temporary authority is squarely contrary to the decision of this Court in *C. J. Community Services, Inc.* v. *Federal Communications Commission*, 100 U.S. App. D.C. 379, 246 F. 2d 660. In that case the Commission, after a hearing, ordered the Appellant to cease and desist from operating a television booster station which had not been licensed by the Commission. At the time of the appeal, the Commission had instituted rule making proceedings to consider, among other things, the legalization of such booster stations. After pointing out that the Commission had misconceived its statutory power by failing to recognize that it could permit the continued operation of Appellant's station despite the fact that it was not licensed, the Court stated it would be "manifestly inequitable" to order Appellant to cease and desist its operation when the Commission had failed to provide an administrative mechanism through which a license might be procured. The Court stated that the Appellant should apply for a special temporary authorization (STA) under Section 1.324 of the Commission's Rules so that it might continue to

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[22] Although the Commission implies it would have acted with expedition on a waiver request (see paragraph 15 of the Decision), it has not passed upon the pending request for expedition. Moreover, the Commission has stated on another occasion that it will refuse to act with expedition on requests for waiver of the top 100 market rule. See letter attached (Appendix D). Thus, the Commission's policy on this matter remains uncertain.

operate pending the completion of the rule making proceedings. The Court then stated (246 F.2d at 665):

> If after consideration of appellant's application, the Commission finds itself unable to authorize the issuance of an STA, the Commission may re-open the "show cause" proceedings.

Thus, the Court of Appeals clearly held that a cease and desist order could not be issued until *after* the Applicant had been afforded a genuine opportunity to legitimize its operation, by procuring an STA, pending the ultimate determination of the permanent legitimacy of that operation.

The situation before the Commission in the present case is in every material respect analogous. Moreover, unlike the Appellant in *C. J. Community* who had not requested interim relief, Appellant was aware of the Commission's legal power to authorize the interim operation of the Greater Muskegon Area CATV system, and promptly filed a request for interim operating authority. When the Commission said it would only consider the STA request if it were filed with a request for waiver, it filed a request for waiver and renewed its request for temporary authority. To the extent that the Commission has refused to consider either of these requests prior to its final decision on the cease and desist order, the holding on the Order to Show Cause in this case is in direct violation of *C. J. Community*.

The Commission in its decision (Par. 15) states that *C. J. Community* is inapplicable since it has provided a procedure for waiver of the requirements of Section 74.1107, while in *C. J. Community* the Commission had not completed its rulemaking considerations with respect to booster stations. However, this difference cannot serve as a basis for reaching different conclusions in the two situations:

> (a) In each case there existed a method for legitimizing the operation on an interim basis pending determination by the Commission of the permanent status of the operations under consideration. In both cases a request for interim

operating authority was available. The Commission's CATV rules clearly contemplate that it may use its discretion to authorize temporary operation during the time it is considering whether service should be permanently authorized. See Sections 74.1105 and 74.1107(d). The Commission recognized this when, in the Order to Show Cause, it stated that it would consider such a request if it were part of a petition for waiver of the rules.[23]

(b) The Commission's distinction would lead to the complete frustration of the decision in *C. J. Community*. Was the Appellant there required to go off the air after the rules making boosters legal were adopted, but before it received a regular license? In fact, the Commission, giving effect to *C. J. Community*, permitted scores of boosters to stay on the air until their license applications could be granted. The fact that final rules have been adopted in this case does not detract from the force of *C. J. Community*. The point of *C. J. Community* is that the operation cannot be ordered terminated before the request for interim relief is considered, and that consideration of that request must include careful examination of the public interest and other factors which demonstrate that the service should be continued until the final determination can be made.

Moreover, this case presents an even more compelling situation for the application of the principles enunciated above than that present in *C. J. Community* itself. In *C. J. Community*, the Commission took the position that the booster operation was illegal from the moment it inaugurated

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[23] The procedural analogy between the instant case and C. J. Community may be completed by recognizing that in C. J. Community a license was necessary in order permanently to legitimize the booster operation while here a grant of the Petition for Waiver is necessary to permanently legitimize the Greater Muskegon Area CATV operation.

service because it was being operated without the required license. On the other hand, in the instant case, it is clear that the Appellant's CATV operation was lawful when commenced in that it was in complete conformity with the specific standard announced by the Commission on February 15, 1966. Since the Commission did, in fact, invite Appellant to commence operations on the representation that its operation would be entirely lawful, it cannot now insist that Appellant stop this operation in order for it to obtain consideration of its request for permanent authority. The least the Commission is required to do to purge itself from its improper behavior is to consider the request for interim relief, *i.e.*, temporary operating authority, before it requires cessation of an operation otherwise in the public interest.

It must be remembered, of course, that the request for temporary operating authority to continue the existing operation affects only the *interim* period pending the Commission's decision on Appellant's request for FCC approval of its operation. The merits of the request for permanent authority, including the possible impact of the CATV system on UHF broadcasting, is totally irrelevant in the consideration of the request for interim authority. No member of the public or any broadcast station could be harmed in this interim period.[24] The Commission, in its decision, expresses concern that Appellant's CATV service may become so "entrenched" that it could not later be terminated, if in the future it were found to be contrary to the public interest - a judgment which the Commission has never yet made. Appellant does not understand why the

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[24] There are no UHF stations authorized to operate in Muskegon, Grand Rapids, or Kalamazoo. There are, however, currently pending before the Commission an application for a construction permit to utilize Channel 17 at Grand Rapids (filed on March 10, 1966 by Allendale Enterprises, Inc.) and an application to utilize Channel 54 at Muskegon (filed on May 19, 1966, by Muskegon Telecasting Company, Inc. — the applicant which supports Appellant's CATV operation). It is unlikely, if not impossible, for any UHF station to get on the air within the period which would be required to determine whether Appellant's operation should be permanently authorized.

Commission could not or would not have full power in the future to order the cessation of the service, if it found that action appropriate. At any event, the Commission and this Court is assured that the service will not become "entrenched" so that it cannot later be terminated since Appellant repeats here what it told the Commission below - if it is properly determined in the future that its operations are contrary to the public interest, it will comply with such a decision of the Commission and the service it is rendering will be terminated. In the meantime, if this Court should determine upon the merits of the appeal that Appellant is required to cease operations prior to consideration by the Federal Communications Commission of the request for legitimation, it will comply. Its service, therefore, cannot become "entrenched."

The Commission's policy announced in other CATV cease and desist proceedings (see *e.g., Buckeye Cablevision, Inc.*, 3 F.C.C. 2d 808, 810-811) that it will refuse to consider the merits of a request for waiver of the requirements of Section 74.1107 until the violation has ceased, is not applicable to the situation in the instant case. The first reason given by the Commission in the *Buckeye* decision is that to condone such a procedure would undercut the premise of Section 74.1107 that new distant signals operations in the major markets must be considered by the Commission before they are commenced. Obviously, since the Appellant's operation was commenced before the rule was enacted, and in complete conformity with the only Commission prior announcement on the subject, this reason can have no validity to the case at bar. The second reason given by the Commission for its policy is that it would encourage other persons to violate the rule while seeking relief from the Commission. This is equally inapplicable here since no other case pending before the Commission involves the commencement of the service in conformity with the February 15, 1966 Public Notice, and it is unlikely that any significant number of such instances exist. The last reason advanced by the Commission for its *Buckeye* policy is that any other procedure would be unfair to persons who have deferred distant

signal operations while seeking a waiver or evidentiary hearing. In this case, since Appellant commenced service in complete good faith at a time when the Commission pronouncement made it clear that this operation was permitted, it would be more unjust for the Commission to apply the policy by requiring the cessation of this service.[25]

III. THE COMMISSION ERRED IN REFUSING TO CONSIDER THE NEED FOR MAINTENANCE OF THE EXISTING SERVICE AND OTHER RELEVANT CIRCUMSTANCES IN ACCORDANCE WITH THE DECISION OF THIS COURT IN THE C. J. COMMUNITY CASE

In *C. J. Community Services, Inc.* v. *Federal Communications Commission,* 100 U.S. App. D. C. 379, 246 F.2d 660, the Commission contended that under Section 312 of the Communications Act it had no discretion to withhold issuance of a cease and desist order when it found a respondent was operating illegally. This Court held that this reading of the Act was erroneous and that Congress intended that the Commission have discretion to withhold such an order, depending on the circumstances presented. The Court made it clear that cease and desist orders may not be predicated on the finding of a violation alone if the Commission has refused to consider facts and circumstances possibly extenuating the respondent's actions and showing service should be temporarily maintained.

The question presented here is: Is the Commission required to consider all the circumstances or can it hold that it will not take evidence on any question but the violation of the statute or its rules? The Commission held below that it is not required to consider any facts other than the violation of the rules if it sees fit to follow this hard line. This is not a case

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[25] Because this policy had not been announced before the Buckeye decision, the Commission nevertheless passed upon Buckeye's Petition for Waiver even though it was operating in violation of the rule. The Commission's reference to Buckeye in paragraph 18 of its decision is irrelevant. Appellant did not ask that the Show Cause and Petition for Waiver proceedings be consolidated as did Buckeye. It merely asked the Commission to withhold action on the cease and desist order until disposition was made of the request for permanent operating authority — the exact procedures followed in Buckeye.

where, having considered all the circumstances, the Commission has decided in its discretion to issue a cease and disist order, but it is rather a case where the Commission has decided before considering the evidence that it will not use the discretion entrusted to it by Congress.

The Commission reversed its Hearing Examiner and held that almost all of the evidence introduced by Appellant should have been excluded, with the effect that Appellant was permitted to make no defense. Appellant had argued to the Hearing Examiner that under Section 312 of the Act as interpreted by this Court in *C. J. Community*, the Commission was not required to issue a cease and desist order upon a finding that a respondent was in violation of a rule, but that the Commission had discretion to decide in light of all the circumstances whether such an order should be issued.[26] Accordingly, Appellant offered into evidence facts and data which it contended were required to be considered by the Commission in the exercise of the discretion granted to it by Congress. The Hearing Examiner held that under the terms of the Order to Show Cause, which permitted Appellant to show why the cease and desist order should not be issued, and under the authority of *C. J. Community*, he was required to accept the evidence. The evidence consisted of:

> (1) Its commitment to the people of North Muskegon and Muskegon and the need for the CATV service. Included was evidence concerning the steady growth in the number of subscribers to this service, many of whom ordered service before it was ever available, to show the favorable attitude of the public toward this service (R. 28-29, 31, 36-37, 58-60). In addition, the action of each governmental subdivision which has

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[26] Section 1.91 of the Rules, under which the proceeding was conducted, made clear that the Commission would entertain such evidence going to the exercise of its discretion. Section 1.91(e) of the Commission's Rules states:

> Correction of or promise to correct the conditions or matters complained of in a show cause order shall not preclude the issuance of a cease and desist order. Corrections or promises correct the conditions or matters complained of, and the past record of the licensee, may, however, be considered in determining whether a revocation and/or a cease and desist order should be issued.

awarded Appellant a CATV franchise or license was introduced into evidence since each such award reflected a determination by the body involved that the service is in the public interest (R. 23-25).

(2) The testimony of the Mayors and Supervisors of every community (including Muskegon and North Muskegon) in the Greater Muskegon Area attesting to the need for service and pointing out the need for educational television available to the area only through the CATV's carrying of the Milwaukee educational station (R. 39-40, 61-67).[27] Both the Mayors' and other undisputed engineering testimony make clear the inadequacy of existing television service and the need for improved signal quality and new service (R. 39-40, 71-73; Tr. 247-256).

(3) The situation with respect to present and prospective UHF operations in the area. The sole applicant for the only UHF station in Muskegon — the very person for whose primary benefit the Commission has imposed restrictions of CATV operations — "fully supports and approves" Appellant's service, including the importation of "distant signals" and supports its request for waiver (R. 68-69). The proposed Muskegon UHF station supports Appellant because only in this way will it be able to be heard by set owners whose sets can receive VHF only. Injury to the CATV system will, therefore, hurt the public need for the development of local UHF service as well. It was also demonstrated that permitting the CATV system to continue operation until the STA and request for permanent operating authority were acted on could harm no UHF operation because no UHF could possibly be on the air in the interim period pending final action on Appellant's requested relief (R. 42-46, 74-77; Tr. 191, 192).

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[27] The FCC has consistently made clear the strong desirability, if not necessity, for providing non-commercial educational television stations as part of the national policy of the United States and Congress has expressly provided grants of federal funds for such purpose. The Commission's order, however, would cut off this valuable service.

(4) The past record of performance of Appellant as a licensee of the Commission. This information was expressly stated to be relevant by Section 1.91(e) of the Commission's Rules and was offered to show that the extraordinary injunction embodied in a cease and desist order was not required in light of the past record of Appellant as a law-abiding licensee who only asked for a day in court in its Petition for STA and request for permanent operating authority (R. 20-22).

(5) The expenditures and commitments of Appellant in connection with the construction and operation of its CATV system (R. 80-83).

(6) That cessation of existing service would cause irreparable injury to Appellant (R. 40-42; Tr. 340-342).

(7) The pendency of Appellant's request for interim relief (R. 46-47).

(8) Appellant's equity because it was misled by the February 15, 1966 Public Notice into commencing operation and was in fact lawful when it started its CATV service. The good faith of Appellant in commencing operation in Muskegon and North Muskegon, including a letter from the Muskegon Area Development Counsel stating that the Greater Muskegon Area was generally considered to be one geographical area (See, *e.g.*, R. 29-34, 49; Tr. 322-331).

The Commission reversed the Examiner and held that it was not required to consider evidence going to the exercise of its discretion "whether a cease and desist order should be withheld until disposition is made of the pending request for waiver." On the contrary, it held it would refuse to consider any of this evidence; it held that the "evidence is irrelevant in this proceeding and should have been excluded." (Par. 14, Decision.) This, therefore, is not a case in which the Commission, having considered evidence going to its discretion, has decided not to exercise its discretion; it is rather a case where the Commission has held that it satisfies the requirements of the Act if it limits a respondent's defense to the sole question of whether it is operating in violation of that rule.

The Commission, however, may not decide in advance that it will refuse to consider a respondent's evidence in its defense. Its own rules (Section 1.91) make clear that the Commission has discretion in determining whether to issue a cease and desist order, even if there is a violation of the Commission's rules. Moreover, the Act requires the Commission to consider the circumstances presented. As the Examiner below held, the Commission is required to consider the defense of a respondent as to why a cease and desist order should not issue. This Court said in *C. J. Community* (2[illegible]3 F.2d at 664):

> Clearly, the Commission *must* weigh the circumstances for Congress says that a cease and desist "shall" be issued *only* if it be decided that the order "should issue." Congress knew very well what it was saying. It surely knows the difference between "should" and "shall." (Emphasis added.)

The Commission has here refused to follow the Court's direction. The cease and desist order must rest on a valid basis for stopping the Appellant's CATV operations, including all the relevant circumstances relating to the particular case at bar. It was, therefore, plainly improper for the Commission to refuse to even consider Appellant's evidence going to its actions, intentions and good faith, as well as to the substantial public interest factors present in this case, particularly since the FCC regulations gave Appellant reason to believe its actions were lawful when taken and under the FCC's forthcoming regulations.

In its decision, the Commission asserts that whatever justification exists for commencing operation in North Muskegon it cannot be urged with regard to the commencement of operation in Muskegon. The Commission's reasoning, however, totally misses the point. Because of the events described earlier, the institution of service in Muskegon was delayed until April 15, 1966 (See p. 19, n. 14, *supra*). On the basis of existing Commission rules and pronouncements as of this date, Appellant reasonably believed that since its operation was lawful when commenced in North Muskegon it could properly expand its system to Muskegon which

was thought to be within the same geographical area.[28] Subsequently, however, the Commission's rulings established that it considered an extension into a "new geographical area" when the extension area is a different political entity, albeit a suburb or adjoining locality.[29] Although Appellant believes that the Commission's interpretation of its rule is arbitrary and that the same geographical area is involved here, the Court need not reach the merits of the Commission's subsequent interpretation here.[30] Rather the central issue involves the good faith of Appellant in commencing service in Muskegon prior to the Commission's clarification of its extension rule and after Appellant had already lawfully commenced operation in North Muskegon.

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[28] Indeed, during the hearing, Appellant introduced into evidence a letter from John Duncan, Executive Vice President of the Muskegon Area Development Counsel which the Commission refused to consider. This letter confirmed Appellant's good faith in starting service in Muskegon. Thus, it stated (R. 49):

> Although these components are separative governmental divisions, the area in which they are located is commonly considered to be one geographical area (The Greater Muskegon Area). The components of the Greater Muskegon Area have common and interrelated social, economic, and cultural ties. Business and industrial development is measured in terms of the whole area. The Greater Muskegon Area is one unified community separate and distinct from other communities located throughout the Great Lakes region.

[29] See Telerama, Inc., 3 F.C.C. 2d 585, which was released April 29, 1966, subsequent to the Appellant's institution of service in Muskegon.

[30] As pointed out above (p. 19, n. 14, supra), under Section 74.1107(d) of the Commission's Rules and pronouncements issued prior to April 15, 1966, the Appellant was permitted to expand its CATV system into the City of Muskegon. This Court will not be required to decide the general validity of the Commission's subsequent interpretation as set forth in Telerama, Inc., supra, since the only pertinent rules and pronouncements in this cease and desist proceeding are those which were made prior to commencement of operations in Muskegon. In the event that the Court deems it necessary to make a determination on the meaning of the applicable rule, it must therefore do so on the basis of the rule as it existed at the time Appellant commenced its operation in Muskegon. It is submitted that the Commission cannot apply its subsequently formulated interpretation in Telerama, Inc. to Appellant's operation without first providing the Appellant with an ad hoc hearing at which it can be heard on the question of whether the rule should be applied to it or conducting further appropriate rule making proceedings. See Section I, Part E, supra.

The plain reading of the rules, prior to the Commission's clarification thereof, bears on the question of Appellant's good faith. The Commission's rules on their face do not prohibit CATV extension into a new geographical area. An evidentiary hearing is requisite as a condition of extension, if a petition is filed by a television broadcaster opposing the extension of a validly operating CATV system into a "new geographical area" where the broadcaster is located. Section 74.1107(d). No such petition had been filed in this case. A system is required to give prior notice at least 30 days before it extends lines into an "obviously new geographical area." Section 74.1105.[31] It is not necessary to consider the interpretation of these rules here. It suffices to say that under the circumstances of this case, the Commission cannot in effect assume from the mere lack of notice that Appellant was indifferent to its rules.[32] The Commission's error was that it refused to consider that matter upon a hearing, and refused to consider the evidence concerning Appellant's actions and intentions which the Hearing Examiner had permitted Appellant to introduce.

In summary, Appellant tendered a substantial justification, in terms of the express provisions of the FCC regulations and announcements, for actions taken in both North Muskegon and Muskegon, prior to FCC clarification of its announcements or rules. The Commission turned its back on this evidence in dereliction of its duty under Section 312 of the Communications Act.

In refusing to consider the excluded evidence and to exercise its discretion as applied to the facts of this case, the Commission takes umbrage in its *Second Report and Order*, stating CATV systems in the top 100 markets should get approval of the FCC before they start to import

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[31] The difference in the quoted terms is most unusual, for it implies that the Commission's "notice requirements" are narrower than its "hearing" requirements.

[32] Appellant subsequently gave notice of its present and proposed operation in its Petition for Waiver filed with the Commission.

"distant signals" (para. 16, Decision). The decision in the *Second Report and Order* is, however, irrelevant to the question here presented. The Commission cannot claim that its action in adopting general rules constitute the type of exercise of discretion required in a cease and desist proceeding. The Commission's rules do not prohibit all new CATV operations or freeze the *status quo* as of a certain date, but rather merely call for prior Commission approval after an evidentiary hearing, in certain situations while not requiring such approval in other situations. No rule was adopted stating that all CATV operation commenced without prior Commission approval after February 15, 1966 must be stopped regardless of the circumstances involved. The *Second Report and Order* simply did not attempt to treat the disposition of cease and desist orders and did not consider the type of evidence which would be admissible in such a proceeding. There was no issue in the general CATV rule making proceeding whether a cease and desist order should be issued while requests for legitimation were pending before the Commission. Indeed, the Commission did not even know that a situation such as the one presented in the case at bar existed when it adopted its rules. The Commission has never applied its discretion to the unusual and singular situation in this particular case which Congress intended it to do before it exercised its authority. The Commission's action is, therefore, in direct violation of the Court's mandate in *C. J. Community*.

IV. THE COMMISSION IMPROPERLY DEPRIVED APPELLANT OF AN INITIAL DECISION

Section 409(a) of the Communications Act, 47 U.S.C. 409(a) requires that in every case of adjudication, the person or persons conducting the hearing shall prepare and file an initial, tentative or recommended decision except where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

The Commission made such a finding in this case. It attempted to support this finding of compelling necessity by reference to a statement in its decision adopting the CATV rules concerning "the very great desirability" of avoiding the disruption of CATV service. From this it argued it should stop CATV service in violation of its rules at the earliest possible moment; it then determined that speed was so essential that it could not afford the short time necessary for the issuance of an Initial Decision by the Examiner.[33]

The subsidiary findings and observations of the Commission do not support the determination that the abandonment of an Initial Decision was imperative and unavoidable. They merely indicate that in the mind of the Commission such speed was highly desirable. More, however, is needed to meet the standard set by the Congress for the extraordinary procedure followed here by the Commission.

The Commission, having waited some five years to take jurisdiction over CATV systems and having waited a year to issue rules, cannot claim the existence of the emergency type situation required to forego the requirement for an Initial Decision or Tentative Decision. Indeed, the Commission, in its newly formulated rules, has not prohibited CATV operations in the top 100 markets or freezed its *status quo* as of a certain date. Thus, for example, existing CATV systems in the 100 largest markets may continue in operation and may even expand if they were operating before February 15, 1966; new CATV systems in these markets which do not propose to import "distant signals" can freely commence operations without Commission approval; and new systems which propose to import "distant signals" can commence operation after obtain Commission approval. Also, CATV systems below the top 100 markets can commence operations whether or not they propose to carry "distant signals" without prior Commission approval. In view of the Commission's general course of action in the CATV field

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[33] The Commission provided Appellant only 7 days to file proposed findings. It certainly could have ordered the Examiner to issue an Initial Decision in the same amount of time. It is appropriate to note that the Commission took 24 days to issue its own Decision after the proposed findings were filed and, as the Court is aware, it stayed its Decision on its own Motion until this Court would act upon a request for a judicial stay.

permitting CATV operation under the foregoing circumstances and the particular events which have transpired in the instant case, it is clear that no valid basis exists, in terms of its rules or the record in this case, on which the Commission can properly predicate a finding of imperative necessity to eliminate the Initial Decision. Every cease and desist proceeding involves, to some extent, the desirability of early compliance and if Congress intended an automatic summary procedure in all such cases, it would have provided for it in the Communications Act. It was not any emergency factual situation with respect to Appellant's CATV operation in the Greater Muskegon Area which motivated the Commission to deny Appellant its normal procedural rights but merely an effort to preserve the sanctity, in some general sense, of its newly adopted CATV rules. But not every operation in technical violation of a rule must be suspended; the Commission is required to consider all public interest factors and it should do so with deliberate speed and by regular procedures, except when there is truly an imperative or unavoidable reason to suspend such procedures.

The omission of the Examiner's report, under the circumstances of this case, deprived Appellant of the full and fair hearing to which it was entitled. First, the Appellant was totally deprived of any opportunity to address itself to any initial or tentative conclusions and was forced, instead, to seek initial relief in the Courts. This is of particular significance in this case which involved novel legal and factual questions which were not previously presented to the Commission in any prior case looking toward the issuance of a cease and desist order in connection with a CATV system. Indeed, at the outset, the Examiner indicated that Appellant would not be permitted to make a full defense, but after *C. J. Community* had been called to his attention, he changed his mind (compare Tr. 3-10 with Tr. 71-72). The purpose of an Initial Decision is to permit the Examiner to give the Commission the benefit of his views on the relevance and admissibility of evidence by rulings made in the context of the hearing situation by the presiding officer.

Secondly, the Appellant was deprived the benefit of the Examiner's observations of the demeanor of Appellant's witness which was of prime importance under the circumstances of this case which involved elements of credibility and good faith of the witness with respect to the events which had transpired. On several occasions during the hearing, the Examiner attempted to reflect on the record factors favorable to Appellant pertaining to its good faith reliance on the February 15, 1966, Public Notice (Tr. 138-139) and Mr. Clark's engineering testimony (Tr. 256). The demeanor element was of sufficient importance in this proceeding — which was adversary and accusatory in nature — so as to require findings by the Examiner on these critical matters, disregarded by the Commission as irrelevant.[34] As we have already shown in Part III, *supra*, the Commission was required to consider matters pertaining to the Appellant's actions, intentions and good faith, and first-hand observations of the witness by the Examiner was certainly an actual consideration.

CONCLUSION AND RELIEF REQUESTED

The Federal Communications Commission decision of July 18, 1966, should be reversed and set aside by this Court. If the Court decides that the Commission, for the reasons set forth in Section I, *supra*, may not apply its revised rules and pronouncements to Appellant, then the Court should set aside the cease and desist order with instructions that a new cease and desist proceeding should not be instituted prior to appropriate proceedings making these rules applicable to Appellant. If the Court decides that the Commission committed reversible error by acting on the cease and desist order prior to action on Appellant's pending requests for relief, the Court should set aside the cease and desist order with instructions that the Commission withhold action on the cease and desist

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[34] The Commission has consistently refused to order that a record in an adjudicatory case be certified directly to it for final decision without first securing an initial decision where the credibility and good faith of witnesses might be a vital issue. The Commission has recognized that the Examiner, who heard the witness, is in the best position to pass, at least initially, upon the credibility of a witness. See, e.g., Paramount Pictures, Inc., 8 Pike & Fischer, R.R. 135; WJR, The Goodwill Station, Inc., 14 Pike & Fischer, R.R. 1269.

proceeding pending the Commission's final determination on Appellant's request for permanent operating authority or the other pending requests for relief. Appellant further prays that this Court provide it such other relief as this Court deems just and proper in light of the other allegations of error.

Respectfully submitted,

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October 5, 1966

APPENDIX A

STATUTES AND RULES INVOLVED

Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*):

Section 312, Administrative Sanctions

* * *

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

Section 402, Proceedings to enjoin, set aside, annul, or suspend orders of the Commission

* * *

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

* * *

(7) By any person upon whom an order to cease and desist has been served under section 312 of this Act.

GENERAL PROVISIONS RELATING TO PROCEEDINGS — WITNESSES AND DEPOSITIONS

Sec. 409. (a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, the person or persons conducting the hearing shall prepare and file an initial, tentative, or recommended decision, except where such person or persons becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision.

(b) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated by the Commission for hearing, any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to the initial, tentative, or recommended decision, which shall be passed upon by the Commission or by the authority within the Commission, if any, to whom the function of passing upon the exceptions is delegated under section 5(d)(1): *Provided, however,* That such authority shall not be the same authority which made the decision to which the exception is taken.

Administrative Procedure Act (5 U.S.C. 1001 - 1011):

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts –

(a) Notice.- General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures. – After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective Dates. – The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions. – Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Federal Communications Commission Rules and Regulations (47 CFR):

Section 1.91, Revocation and/or cease and desist Proceedings; hearings.

* * *

(e) Correction of or promise to correct the conditions or matters complained of in a show cause order shall not preclude the issuance of a cease and desist order. Corrections or promises to correct the conditions or matters complained of, and the past record of the licensee, may, however, be considered in determining whether a revocation and/or a cease and desist order should be issued.

APPENDIX B

Community Antenna Television Regulations Adopted by the Federal Communications Commission in Its Second Report and Order in Docket No. 15971. Published in the Federal Register on March 17, 1966. 31 F.R. 4540

SUBPART K—Community Antenna Television Systems

§ 74.1101 Definitions.

(a) *Community antennal television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives, directly or indirectly, over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and redistributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's Grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and Grade B contours.* The terms "Grade A contour" and "Grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.

(e) *Network programming.* The term "network programming" means the programming supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programming of one or more stations, singly or collectively, in a normal week during the hours of 6 to 11 p.m., local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the Grade B contour of that station.

§ 74.1103 Requirement relating to distribution of television signals by community antenna television systems.

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 watt or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station;

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations, within whose Grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose Grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 watt or higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programming is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is

within the Grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose Grade B or higher priority contour it operates, or the signals of one or more 100 watt or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and non-cable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(d) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art);

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation); and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the Grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not

against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least eight days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* Notwithstanding the requirements of paragraph (f) of this section,

(1) The CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section);

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., Eastern Time, but is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved;

(3) The system need not delete reception of any program consisting of the broadcast coverage of a speech or other event as to which the time of presentation is of

special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

§ 74.1105 Notification prior to the commencement of new service.

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watt or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour

into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and state educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter, within thirty (30) days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided*, however, that service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a

television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission,

upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determines that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on

all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promply issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

APPENDIX C

FEDERAL COMMUNICATIONS COMMISSION

79927

WASHINGTON, D. C. 20554

PUBLIC NOTICE - G
February 15, 1966

FCC ANNOUNCES PLAN FOR REGULATION OF ALL CATV SYSTEMS

Following meetings held February 10, 11, and 14, the Commission has reached agreement on a broad plan for the regulation of community antenna television systems, including a legislative program. To insure the effective integration of CATV with a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses, and those which receive their signal off the air. Excluded from these rules will be those CATV systems which serve less than fifty customers, or which serve only as an apartment house master antenna. The CATV rules concurrently in effect for microwave-fed systems will be revised to reflect the new rules adopted for all systems.

Coupled with the new CATV rules, to be incorporated in a Report and Order shortly to be issued, the Commission will send recommended legislation to Congress to codify and supplement its regulatory program in this important area.

The Commission's new CATV program includes eight major points:

(1) Carriage of local stations. A CATV system will be required to carry without material degradation the signals of all local television stations within whose Grade B contours the CATV system is located. The carriage requirements thus made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's First Report and Order in Dockets 14895 and 15233, adopted in April, 1965.

(2) Same day non-duplication. A CATV system will be required to avoid duplication of the programs of local television stations during the same day that such programs are broadcast by the local stations. This non-duplication protection, as under the existing rules, will apply to "prime-time" network programs only if such programs are presented by the local station entirely within what is locally considered to be "prime-time". It will also give the CATV subscribers access to network programs on the same day that they are presented on the network. Non-duplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system.

(over)

The new non-duplication rules thus embody two substantial changes from those adopted in the First Report and Order. First, the time period during which non-duplication protection must be afforded has been reduced from fifteen days before and after local broadcast to the single day of local broadcast. Second, a new exemption from the non-duplication requirement has been added as to color programs not carried in color by local stations.

(3) Private agreements and ad hoc procedures. The Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. Moreover, the Commission will give ad hoc consideration to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules.

(4) Distant City Signals -- New CATV systems in the top 100 television markets. Parties who obtain state or local franchises to operate CATV systems in the 100 highest ranked television markets (according to American Research Bureau (ARB) net weekly circulation figures), which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be required to obtain FCC approval before CATV service to subscribers may be commenced. This aspect of the Commission's decision is effective immediately, and will be applicable to all CATV operation commenced after February 15, 1966.

An evidentiary hearing will be held as to all such requests for FCC approval, subject, of course, to the general waiver provisions of the Commission's rules. These hearings will be concerned primarily with (a) the potential effects of the proposed CATV operation on the full development of off-the-air television outlets (particularly UHF) for that market, and (b) the relationship, if any, of proposed CATV operations and the development of pay television in that market. The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market.

Service presently being rendered to CATV subscribers will be unaffected. However, the Commission will entertain petitions objecting to the geographical extension to new areas of CATV systems already in operation in the top 100 television markets.

(5) Distant City Signals -- New CATV systems in smaller television markets. The Commission's prior approval after an evidentiary hearing will not be required by rule for proposed CATV systems or operations in markets below 100 in the ARB rankings. However, the Commission will entertain, on an ad hoc basis, petitions from interested parties concerning the carriage of distant signals by CATV systems located in such smaller markets.

(6) Information to be filed by CATV owners. Pursuant to its authority under Section 403 of the Communications Act, the Commission will, within an appropriate time to be prescribed, require all CATV operations to submit the following data with respect to each of their CATV systems: (a) the names, addresses and business interests of all officers, directors, and persons having substantial ownership interests in each system; (b) the number of subscribers to each system; (c) the television stations carried on each system; and (d) the extent of any existing or proposed program origination by each CATV system.

(7) Assertion of jurisdiction. To the extent necessary to carry out the regulatory program set forth above, the Commission asserts its present jurisdiction over all CATV systems, whether or not served by microwave relay.

(8) Legislation to be recommended to Congress. The Commission will recommend, with specific proposals where appropriate, that Congress consider and enact legislation designed to express basic national policy in the CATV field. Such legislation would include those matters over which the Commission has exercised its jurisdiction, as well as those matters which are still under consideration.

Included in these recommendations will be the following:

(a) Clarification and confirmation of FCC jurisdiction over CATV systems generally, along with such specific provisions as are deemed appropriate.

(b) Prohibition of the origination of program or other material by a CATV system with such limitations or exceptions, if any, as are deemed appropriate.

(c) Consideration of whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system.

(d) Consideration of whether CATV systems should or should not be deemed public utilities. In this connection, Congress will be asked to consider the appropriate relationship of federal to state-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

The Commission, of course, stands ready to discuss all of the above matters with the appropriate Congressional committees at any time.

- FCC -

Attachments

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

I cannot agree that the Communications Act confers jurisdiction over CATV; however, I endorse legislation which would prohibit a CATV system from originating program matter.

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SEPARATE STATEMENT OF COMMISSIONER KENNETH A. COX

I concur fully in those portions of the Commission's action in which it (1) asserts jurisdiction over all CATV operations, (2) requires carriage of local stations on CATV systems, (3) provides for expedited ad hoc procedures for the consideration of special relief requested either by broadcasters or CATV operators, (4) requires disclosure of information as to ownership of CATV systems and certain other matters, and (5) calls on Congress to give prompt consideration to the problem of integrating CATV operations into our overall television system, with particular attention to the questions of program origination by CATV systems, possible extension of the principle of rebroadcast consent, and overlapping jurisdiction with the states.

As to the balance of the action taken, I agree with what is done but believe it falls far short of protecting the public interest in an expanding television service. I agree that local stations should not have their programs duplicated, but believe that the protection afforded them is totally inadequate. As to network programs, they should be accorded exclusivity -- that is, should not be duplicated -- as to all programs which they propose to present in a comparable time period within fifteen days. 1/ This Commission found in the First Report that, for cogent reasons, delayed non-duplication served the public interest. See Pars. 101-127, 38 FCC at 721-731. But the majority now cuts back on such delayed non-duplication to a single day. This one day protection is patently inadequate as to network programming (see First Report, Par. 125, 38 FCC at 730, where it is pointed out that only 10.2% of local stations' delayed broadcasts are delayed less than one day, with roughly 79% being delayed between 1 and 15 days). As to non-network programs, the majority previously pointed out that such material was not distributed on a simultaneous nationwide basis and that, therefore, a 15 day protection was

> "clearly a minimal measure of protection against the duplication of syndicated or feature film programs, considering the extended periods -- up to and exceeding 5 years -- for which stations now bargain and obtain exclusivity in relation to such programs."

As to feature film, syndicated series, and other filmed or taped programming for which they have acquired local exhibition rights, they should be assured the right of first run -- which is only one of the rights normally bargained for, but certainly the most important one. I realize that this is more protection than was proposed in this proceeding, but since I feel this would be necessary to assure the station of the most important of the program rights it has acquired as against prior exhibition by an entity which has acquired no rights at all, I certainly cannot agree with the majority's refusal to recognize any rights as to such programming. Some non-simultaneous non-duplication is necessary to

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1/ I agree that as to network color programs the local station should not be protected unless it will present them in color.

(over)

afford local stations sufficient flexibility to provide the best possible service to those viewers who do not subscribe to the cable service.

Similarly, I agree that some measures are needed to curb the indiscriminate extension of television signals by CATV systems. Section 303(h) of the Communications Act gives us clear authority to establish zones or areas of service for broadcast stations. In television, I think we have undertaken to do this by establishing a carefully designed channel allocation and by fixing maximum limits on heights and powers. While there are many situations in which deficiencies of service can and should be corrected by supplemental means such as CATV, satellites and translators, I do not believe that any of these auxiliary services should be permitted to disrupt the basic television system that Congress, the Commission and the broadcasters have worked so hard to establish.

The majority contents itself with saying that it will carefully examine proposals to provide CATV service in the top 100 television markets. I would greatly prefer an approach which would bar new systems -- for a specified period -- from extending a station's signal beyond its Grade B contour, except upon authorization by the Commission in certain carefully defined situations. I believe this is necessary to stem the current proliferation of CATV systems in areas already receiving substantial television service. Without such action, I am afraid that CATV -- a supplemental and derivative service -- will stunt the future growth of our free television system, and perhaps even impair the viability of some of the service which the public is now receiving.

It is all very well to study the problems posed by CATV's threatened invasion of the major markets. It is true that the most immediate hopes for expanded UHF service are centered there, and that the risk of CATV operators' building a pay television system on the basis of signals appropriated from the broadcasters who now provide our free service is greatest there. But if we turn our backs on the smaller markets by assuring cable operators that they can pump in multiple competing signals from New York and Los Angeles unless a local broadcaster can prove that he will be driven out of business, I think we are on the way to substituting a shrinking for an expanding system, with an artificial ceiling on network and local service alike -- all in the name of a multiplicity, if no real diversity, of service for a part of the public. I am afraid we may end up with a shrunken, substantially wired pay service for the majority of the public, and a really vestigial system for those who cannot afford, or cannot be provided, this service.

I am not comforted by the majority's confidence that it would reverse such a trend if it really became a clear threat. The Commission does not have a good record for taking such drastic measures -- in fact, I think much of my colleagues' reluctance to take more meaningful action now stems from fear of disrupting the existing service of a rather small number of CATV subscribers who have been galvanized into pressuring Congress and the Commission by a campaign of outright misrepresentation by the CATV industry. If this bothers them, what likelihood is there that they will ever roll back any part of the greatly expanded CATV operations which I think their actions will bring into being? New York City signals have already been carried to points near the Ohio

border, and service from Los Angeles is proposed for Oklahoma and Texas. Once such service is instituted, I am afraid it is impossible to roll it back. I think the majority itself recognizes this problem, as is indicated by the fact that in the release announcing their action they twice very carefully point out that service now being rendered to CATV subscribers will be unaffected by what they are doing.

I do not mean to suggest that I know or can prove that the consequences I fear will actually result -- though I think my concerns are shared by many leaders of the broadcast industry, by certain organizations which represent elements of the public who stand to be disadvantaged by increased reliance on wired television, and by other interested and informed parties. But on the other hand, my colleagues cannot prove that my fears are groundless. My approach would not impair the viability of existing cable systems and would not bar all further extension of CATV service. But it would confine such service to its proper supplemental role in areas which receive substandard over-the-air television for a limited period -- say five years. That would give Congress and the Commission time to study the whole problem further, would permit continued UHF development, and would, hopefully, permit resolution of the copyright questions which are basic to the future of CATV.

By not taking the admittedly more rigorous course which I favor, the majority has, I believe, invited developments which may make further study futile, may stifle UHF development which otherwise would have occurred, and may make it politically difficult, or even impossible, to adhere to normal copyright principles. I do not think that the benefits it is claimed CATV will bring are worth the hazards to our television system created by the limited action here taken by the majority. If there is one thing that even critics of the Commission concede it is that this agency was created for the purpose of allocating communications facilities. Both Sections 307(b) and 303(h) of the Communications Act make this clear. I think the majority is simply refusing to discharge this responsibility. Now is the time to take hold of the problems posed by the explosive development of the CATV industry and to fit cable operations into an appropriate place in the overall television structure. I think we are at a real turning point as far as the development of American television is concerned -- and I think the majority has taken the wrong direction.

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STATEMENT OF COMMISSIONER LEE LOEVINGER REGARDING FCC CATV PLAN

The analysis of jurisdiction set forth in my prior opinion in this proceeding, 38 FCC 683, 746 (1965), still represents my view. The significance of that analysis and its divergence from the course now adopted by the Commission need no elaboration. On the other hand, the substantive position now adopted by the Commission seems to me to be a moderate and reasonable compromise of conflicting views and positions, and the Commission now recognizes the desirability, if not necessity, of requesting Congress to legislate on jurisdiction and other important aspects of this subject. In these circumstances I think it is more constructive and useful to support affirmative action by the Commission, leaving the jurisdictional issue to be decided by Congress and the courts, rather than stand on legalistic grounds or inflexibly insist on complete adoption of my own ideas. Accordingly, with a dubitante recorded as to jurisdiction, I concur in the plan now approved by a majority of the Commission for regulating community antenna television systems.

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APPENDIX D

22-H
(Att. 6th)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

April 27, 1966

ADDRESS ALL COMMUNICATIONS TO THE SECRETARY
IN REPLY REFER TO
6010

Susquehanna Broadcasting Company
Box 2026
York, Pennsylvania 17405

Gentlemen:

On April 15, 1966, you filed a petition by which you requested, pursuant to Section 74.1107, that the Commission waive the evidentiary hearing requirement of Section 74.1107 of the Rules and Regulations. As the holder of a franchise granted by the City of York, Pennsylvania, you propose to construct and to operate a CATV system in that community. The following "distant signals" (as defined by Rule Section 74.1101(i)) will be supplied to your subscriber in York: WKBS-TV, Burlington, New Jersey-Philadelphia, Pennsylvania; WPHL-TV, KYW-TV, WFIL-TV, and WCAU-TV, all in Philadelphia; and WITG, WRC-TV, WETA-TV, all in Washington, D. C.

York, Pennsylvania, is located within the predicted Grade A contours of television broadcast stations in the 33rd television market according to ARB net weekly circulation for 1965. The requirements for an evidentiary hearing relating to the 100 largest television markets are contained in Section 74.1107 of the rules. Section 74.1109 of the rules sets forth the procedures applicable to petitions for waiver of the rules, for additional or different requirements than those provided in the rules, ruling on complaints or disputes, and special summary procedures in connection with those matters. In the Commission's Second Report and Order in Dockets 14895, 15233 and 15971 it was stated"...such procedures will not apply to the matter of distant signals in the top 100 markets, for which a showing made in evidentiary hearing is required..." (31 F.R. 4555). Consequently, your petition will not be considered under the expedited procedures set forth in Section 74.1109 of the rules. However, it has been given public notice pursuant to Section 74.1107 of the rules, and will be given consideration in normal course as a request for waiver of the evidentiary hearing of such rule.

Very truly yours,

Ben F. Waple
Secretary

REPLY BRIEF OF APPELLANT BOOTH AMERICAN COMPANY

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

BOOTH AMERICAN COMPANY,

Appellant,

348

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal From a Decision of the
Federal Communications Commission

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Of Counsel:

COHN AND MARKS
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Washington, D. C. 20006

November 25, 1966

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

BOOTH AMERICAN COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

On Appeal From a Decision of the
Federal Communications Commission

REPLY BRIEF OF APPELLANT BOOTH AMERICAN COMPANY

I

The Commission, in its Brief (pp. 29-33), defends a decision which the Commission never made; it now urges that the Commission did not limit the scope of the inquiry below to the sole issue of the violation of the

rule but, in fact, exercised its wide discretion in reaching the determination that a cease and desist order should not be withheld pending a determination on Appellant's request for temporary or permanent approval of its CATV operation in the Greater Muskegon Area of Michigan. In support of this argument, the Commission points to one paragraph (par. 13) in the decision below in which it asserts that the Commission considered Appellant's claim that it was affirmatively misled into commencing operation based on the express standard announced in the February 15, 1966 Public Notice. The Commission contends that the Commission's consideration and rejection of this "special equity" was all that was required under the mandate of *C. J. Community Services, Inc.* v. *Federal Communications Commission*, 100 U. S. App. D. C. 379, 246 F.2d 660.

In the first place, the Commission, in its decision, rejected the Appellant's contention concerning its reliance on the February 15th standard (the so-called "special equity") on the ground that there was really no change between the Commission's top 100 market standard announced on February 15, 1966 and the one announced on March 8, 1966, and that Appellant should have known that the standards announced in each were the same. The Commission, in its Brief, however, now admits that this finding was erroneous since it acknowledges for the first time that there was, in fact, a change in the scope and applicability in the standard between February 15, 1966 and March 8, 1966 (See Part III, *infra*). Consequently, the Commission's consideration of this one matter, while excluding as irrelevant all of the public interest factors favoring a temporary continuance of the existing CATV operation, was based upon an erroneous premise even if it constituted the exercise of discretion contemplated by *C. J. Community*. Indeed, the fact that Appellant was affirmatively misled into commencing operations on the representation that its operation would be entirely lawful presents a compelling, if not required, reason for the Commission to consider the particular circumstances of this case favoring

continued operation during the interim period pending a decision on Appellant's request for temporary or permanent operating authority.

Most important, however, the Commission refused to consider any of the significant public interest considerations and other mitigating circumstances favoring the continuation of the existing CATV operation pending a determination on the Appellant's request for temporary or permanent operating authority[1] (See Appellant's Brief, pp. 34-36). The Commission reversed the Hearing Examiner, who had permitted the introduction of this evidence, holding that this "evidence is irrelevant in this proceeding and should have been excluded." (Decision, par. 14). The Commission, in its Brief, does not dispute that the Commission

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[1] The evidence concerning the need for the maintenance of the existing service during the interim period tendered by Appellant in the hearing below was uncontroverted. This evidence consisted of, among other things, the testimony of the Mayors of both North Muskegon and Muskegon in support of the CATV operation; engineering testimony showing that the television reception in these two communities was inadequate; testimony showing that the CATV system would provide the residents of the area with an educational service for the first time, as well as other services not otherwise available; testimony showing a strong public demand for the CATV service; and testimony of the only UHF applicant in Muskegon, which indicated that it favored the continued operation of the CATV system. In addition, Appellant tendered uncontroverted evidence which demonstrated that no person or broadcast station could be harmed in the interim period if Appellant were permitted to temporarily continue its existing operation. Moreover, evidence was tendered showing that the termination of service would cause Appellant irreparable injury; that Appellant acted in good faith in starting service in North Muskegon and Muskegon, including testimony that the Greater Muskegon Area is considered to be one geographical area; and that Appellant had filed a request for temporary operating authority. Not only did the Commission, in its decision, refuse to consider any of this evidence, but the Commission's assertion, in its Brief, that continued operation would be contrary to the public interest is not supported by a single fact in the record of this case.

refused to consider any of this evidence.[2] The Commission's Brief does not provide a single reason explaining why the evidence tendered by Appellant demonstrating the need and public demand for the maintenance of the existing service, as well as the justifications for its actions, was excluded by the Commission as totally irrelevant and, indeed, does not even discuss the problem other than to state the evidence was not considered. The reason for this omission is apparent since this Court, in *C. J. Community*, made it clear that the Commission could not force an existing operation off the air merely on the finding of a violation of a rule alone, without first considering the public interest and other mitigating factors present in the particular case so that it could exercise its discretion as to whether a cease and desist order should issue on the basis of these factors.

Thus, it is clear that the Commission never exercised its discretion based on the particular public interest factors and other mitigating circumstances existing in this case, in direct violation of Section 312 of the Communications Act as interpreted by this Court in *C. J. Community*. The Commission's attempt now to impute some discretion to the Commission decision below constitutes nothing more than an after-thought resulting from the recognition that the failure to exercise its discretion before issuing a cease and desist order would be in patent violation of Section 312 of the Communications Act. This attempt, however, is not borne out

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[2] Indeed, the Commission. in its Brief (p. 13, n. 10), acknowledges that the Commission rejected Appellant's argument made below that the Commission was required to consider this evidence tendered by it in order to determine whether a cease and desist order should be withheld until the request for waiver (i.e., permanent operating authority) was acted on. The Commission, in its decision, held that the decision of this Court in C. J. Community was inapplicable in this proceeding; but now, in its Brief. the Commission seems to recognize that C. J. Community is applicable, but it argues that it exercised its discretion in accordance with that case.

by the events that transpired below. In its Order to Show Cause, the Commission stated that there was only one issue to be resolved in this case, namely, whether there was a violation of Section 74.1107 of its Rules. The Commission's Broadcast Bureau took the position that the only issue in the case was whether there was a violation of the rule and that all of the evidence relating to the public interest considerations and other mitigating circumstances was totally irrelevant in this proceeding (Tr. 111-113). In its decision issuing the cease and desist order, the Commission persisted in maintaining this hard line, holding as a matter of law that it was not required to consider any facts other than the facts pertaining to the violation of the rule before ordering the operation to terminate. Thus, the Commission indicated that it would defer any exercise of discretion until such time as it would consider Appellant's request for permanent operating authority and held, in the meantime, Appellant must cease its existing operation on the sole ground that it was in violation of the rule. Consequently, the Commission, having held that all of the public interest and other relevant factors should have been excluded in this proceeding as irrelevant, could not have exercised its discretion on the question of whether to temporarily withhold the issuance of a cease and desist order pending a determination in another proceeding as to whether the Appellant's CATV operation should be authorized,as required by *C. J. Community*.[3]

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[3] In an effort to cure the error of refusing to consider the particular facts of this case and of refusing to exercise its discretion based on these facts, the Commission now argues that it did not have to exercise its discretion in the cease and desist proceeding based on the particular facts and circumstances of this case because it already exercised its discretion when it adopted the rule in the general rule making proceeding. This argument, however, makes no sense. As already explained in Appellant's Brief (pp. 39-40), the adoption of general rules do not constitute the type of exercise of discretion required in a cease and desist proceeding. The rule making proceeding never directed itself to the question of what type of evidence would be admissible in a cease and desist proceeding and, indeed, at the time of the rule making proceeding, the Commission could not have known that a situation like the one in this case would occur. A cease and desist order can be issued only after the Appellant is permitted to make a full defense to show why such an order should not be issued, notwithstanding the fact that the Appellant is in violation of the rule. Appellant was never given that opportunity in this case.

II

The Commission further argues (Brief, pp. 33-34) that the refusal to consider Appellant's request for temporary operating authority before ordering the termination of Appellant's CATV operation was not contrary to the Court's holding in *C. J. Community*. The Commission argues that *C. J. Community* is inapplicable since it has provided a procedure for obtaining permanent operating authority here, while in *C. J. Community* the Commission had not completed its rule making consideration with respect to the legitimation of booster stations. Thus, the Commission attempts to distinguish the situation here from the situation in *C. J. Community* on the ground that Appellant here was not forced, as the Appellant was in *C. J. Community*, into a position of having an unlicensed operation or no operation at all. This attempted distinction, however, is not valid and does not serve as a basis for reaching different conclusions in both situations.

Contrary to the assertion made in the Commission's Brief, the Appellant here was forced between having an unapproved operation or no operation. The fact that final rules had been adopted whereby the Appellant could permanently legitimize its operation does not detract from the force of *C. J. Community*. Appellant commenced its CATV operation on March 4, 1966 on the express representation of the Commission that such operation would be lawful since it was not within the purview of the top 100 market rule. On March 8, 1966 the Commission changed the scope and applicability of its top 100 market standard so that Appellant's operation was no longer legal. Thereafter, Appellant submitted a request for permanent operating authority, which is still pending.[4] However,

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[4] Significantly, the Appellant's request for permanent operating authority was filed with the Commission on June 10, 1966 — over five months ago. The Commission has not acted on this request as of this date.

until the Commission would act of that request, the Appellant, as the operator of a CATV system already on the air, was immediately confronted with a choice of either maintaining its existing operation without F.C.C. approval or no operation at all, unless the Commission would consider its request for temporary operating authority. The purpose of Appellant's request for temporary operating authority was to obtain relief so that it might continue to operate in this interim period.

The critical period is the interim period pending the decision in another proceeding on the request for permanent operating authority. *C. J. Community* stands for the proposition that an existing operation cannot be ordered terminated before the request for interim relief is considered, and the consideration of that request must include careful examination of the public interest and other factors which demonstrate that service should be continued until the final determination can be made. This proposition is particularly applicable here where Appellant's operation was lawful when commenced. Moreover, uncontroverted evidence demonstrated that such continued operation during the interim period would be in the public interest and would harm no one. The Commission, however, has never acted on Appellant's request for temporary operating authority and, indeed, the decision below does not even refer to the fact that it is pending. Nowhere has the Commission, in its decision or the Brief, explained why it did not consider Appellant's request for interim relief. The Commission's failure to consider the request for interim relief was manifestly inequitable under the circumstances of this case and is contrary to the decision of this Court in *C. J. Community*.

III

The Commission argues that the Appellant was not prejudicially misled by the February 15, 1966 Public Notice because virtually all of its expenditures and commitments were made prior to the issuance of the Public Notice. This argument, however, is a *non sequitur*. The Appellant did not start service because it had made expenditures and commitments in connection with the construction of its CATV system prior to February 15, 1966. Rather, the Appellant commenced service on March 4, 1966 because the unequivocal language of the Notice gave Appellant an express go-ahead since it stated that the top 100 market rule would not affect the Greater Muskegon Area CATV operation. Appellant would not have started service on March 4, 1966 if the standard announced on February 15, 1966 had been the same as the one announced on March 8, 1966, regardless of the extent of its financial expenditures and commitments and the status of construction as of February 15, 1966. It was, of course, entirely proper for Appellant to proceed with the construction and planning for its CATV system prior to February 15, 1966.[5] During the pendency of the rule making proceeding leading to the February 15th Notice, the Commission did not place a freeze or any other restriction on the construction or operation of CATV systems, such as Appellant's

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[5] The Commission asserts (Brief, pp. 21-22) that Appellant may have planned and arranged the construction of its CATV system with the hope that it would be in operation before the Commission promulgated any Rules. This assertion is completely without factual support in the record and, indeed, to the contrary, the record contains uncontroverted evidence that the Appellant took no unusual step to accelerate the institution of service and that it conducted its business in a normal manner (Tr. 154). Moreover, the Commission, in its decision, did not find that Appellant in any way accelerated the construction of its system in order to institute service prior to the date that the Rules were adopted.

system. It is clear that Appellant, which has held out to the public that it could and would provide service to them in light of the express go-ahead issued by the Commission, would be prejudiced by the termination of this service which was entirely lawful and authorized when commenced (See Appellant's Brief, pp. 21-22).

The Commission, in its Brief (p. 22, n. 14), now states for the first time that the February 15, 1966 Public Notice "misstated the scope of §74.1107" and, therefore, it completely reverses the position taken in the decision by admitting to the Court that the standard did, in fact, change between February 15th and March 8, 1966.[6] The Commission further states (Brief, p. 21) for the first time that ". . . the language of the Public Notice provides a basis for Booth's asserted belief (as of February 15, 1966) that the rule would not apply to its North Muskegon system" — a sharp contrast to the position taken in the Commission's decision. The Commission, however, now seeks to minimize the importance of the February 15, 1966 Public Notice.[7]

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[6] The Commission, in its decision below, failed to admit that there was any change in the scope and applicability of its top 100 market standard between February 15, 1966 and March 8, 1966. Thus, the Commission stated (Decision, par. 13):

> "Insofar as the February 15, 1966, public notice is concerned, the announcement was intended to emphasize the all-inclusive application of the proposed rule, i.e., to each and every CATV system operating within the Grade A contour of each and every television station located in 1 of the 100 highest ranked television markets . . . respondent could hardly have failed to realize that this was a possible, if not probable, construction to be placed on the words used in the notice . . ."

[7] The Commission contends that the February 15, 1966 Notice did not announce a rule, apparently because a rule was not set forth in the traditional fashion, e.g., with a rule number, etc. The Administrative Procedure Act, however, does not take such a narrow view of what constitutes a rule for purposes of applying the procedures set forth in Section 4 of that Act. Section 2(c) of the Administrative Procedure Act defines a rule to mean ". . . the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . ." Section 2(c) defines rule making to mean an ". . . agency process for the formulation, amendment, or repeal of a rule." The standard announced in the February 15, 1966 Notice constituted a rule within the meaning of Section 2(c).

Regardless of how the Commission now seeks to characterize its February 15th Public Notice, it cannot seriously dispute the fact that it set forth a specific standard in that Notice concerning the importation of "distant signals" into the 100 largest television markets. The Commission stated in the Notice that "This aspect of the Commission's decision is effective immediately and will be applicable to all CATV operations commenced after February 15, 1966." The Commission obviously released this Notice to set forth a definite standard in order to provide immediate guidance to the public. Once it released the Notice, the Commission must have expected the public to conduct its affairs in accordance with the specific standard that it had announced. This is precisely what Appellant did here when it commenced service on March 4, 1966 in North Muskegon.

The Commission cannot in good faith issue standards to inform and guide the public on how to conduct its affairs and then, after the public acts in full accord with the announced standard, repudiate the standard to summarily make illegal the very action it previously authorized. Since the Appellant here acted in reliance on the specific standard announced by the Commission on February 15, 1966, the Commission must, at a very minimum, either conduct further rulemaking proceedings or hold an *ad hoc* evidentiary-type hearing at which the Appellant could be heard before ordering its operation, otherwise in the public interest, to terminate.

IV

The Commission argues that, even if the North Muskegon operation is held to be legal on the ground that the Appellant was prejudicially misled, Appellant had no justification for commencing service in Muskegon. In this connection, the Commission now argues that Appellant was indifferent to the requirements of the rules insofar as its operation in Muskegon was concerned. However, the Commission, in its decision, did not

find that Appellant lacked good faith or that it was indifferent to the requirements of its rules and, indeed, the Commission excluded all the evidence pertaining to Appellant's motivations and intentions in commencing service in Muskegon. At any event, contrary to the assertion in the Commission's Brief, the testimony of Mr. Clark in the proceeding before the Commission, demonstrates that Appellant, in fact, made a good faith determination under the applicable Commission rules and pronouncements available to it at that time and, under these applicable rules and pronouncements, it justifiably decided that it had the right to commence operation in Muskegon. Mr. Clark reasonably determined that Muskegon was in the same geographical area as North Muskegon and he believed, under the Commission's applicable rules and pronouncements then in effect, that a lawfully existing CATV could certainly expand operation, so long as it did not enter into a new geographical area. (See Appellant's Brief, pp. 37-39; Tr. 324-325).

No reasonable person could have read the rule to mean what the Commission subsequently interpreted the rule to mean in *Telerama, Inc.*, 3 F.C.C. 2d 58 (released April 29, 1966).[8] Indeed, in issuing an injunction *pendente lite* in this case on September 16, 1966, this Court, in a review of the Commission's rules in existence at the time of Mr. Clark's determination to proceed in Muskegon, based on the information before it, decided that there was a reasonable justification for Mr. Clark's understanding of the plain meaning of that rule. The Court's preliminary reading of the extension rule in effect at the time that Appellant commenced operation in Muskegon was the same as the interpretation of the

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[8] The validity of the Commission's subsequent interpretation of its extension rule is now being litigated in the United States Court of Appeals for the Sixth Circuit (Telerama, Inc. v. United States and the Federal Communications Commission, Case No. 17,311). On November 23, 1966, that Court, after full briefing and argument on the merits, issued a temporary injunction pendente lite, a copy of which is attached, indicating that Petitioner would prevail insofar as the interpretation of the rule may not be given retroactive effect.

rule made by Appellant. The Court, like Appellant, did not discern in the words of the rule any limitation on expansion based on the fact that the contiguous area was a separate political subdivision. Upon issuance of the Court's Order and Memorandum granting the injunction, the Commission requested reconsideration, claiming that the Court misinterpreted Section 74.1107 and that, among other things, the language of the Court concerning its preliminary interpretation of that rule be deleted from the opinion. Upon rehearing, the Court refused to delete the language concerning its interpretation of the rule, holding that Appellant's action in commencing service in Muskegon, taken prior to the Commission's clarification of that rule in *Telerama, Inc.*, was "based upon a not unreasonable interpretation of the applicable rules and announcements".[9] The Court stated that Appellant, in proceeding in Muskegon, the contiguous but separate political subdivision, did not act unreasonably in its own interpretation "of an ambiguous F.C.C. regulation."

The Commission's interpretation of its extension rule contained in its Brief is the interpretation of the Commission formulated subsequent to the date that Appellant commenced operation in Muskegon. It is not necessary in this proceeding for this Court to decide the validity of this subsequent interpretation. The only issue in this case is the good faith of Appellant in commencing service in Muskegon,prior to the Commission's clarification of the extension rule and after Appellant had already lawfully commenced operation in North Muskegon,for purposes of deciding whether to withhold the issuance of a cease and desist order until the request for legitimation of the Muskegon operation could be passed upon. This Court, in issuing the injunction *pendente lite*, found that Appellant had tendered a "substantial justification, in terms of the express

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[9] See Order and Memorandum of this Court issued on October 3, 1966.

provisions of the F.C.C. regulations and announcements, for actions taken prior to F.C.C. clarification" in both North Muskegon and Muskegon. The Commission erred in refusing to even consider any evidence concerning Appellant's actions and intentions in commencing service in Muskegon, as well as in North Muskegon, before it issued the cease and desist order, in direct violation of the mandate of *C. J. Community*.

Respectfully submitted,

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November 25, 1966

APPENDIX

[Filed November 23, 1966]

No. 17,311
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TELERAMA, INC.,
Petitioner,
vs.
UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,
Respondents.

Before: O'SULLIVAN, PHILLIPS and EDWARDS, Circuit Judges.

This court having received and considered a petition to review an order of the Federal Communications Commission dated April 29, 1966, and an application for an interlocutory injunction staying said order pendente lite;

And having advanced said matter sua sponte for hearing in the October 1966 term of this court;

And having received briefs and records concerning said petitions from both petitioner and respondents and heard arguments thereon;

And this court having noted petitioner's claim that irreparable damage will be done during the course of this litigation unless said order is stayed as it pertains to peritioner's proposed operations in the city of Euclid (and two other suburbs of Cleveland);

And having noted that petitioner asserts, and respondents do not deny, that it had performed substantial work in said city of Euclid toward the completion of its CATV distribution system prior to April 29,

1966, and had also completed substantial portions of said work prior to February 15, 1966,[1] in that 1) with respect to the Euclid area the master cable was extended almost eight miles from Beechwood, and the Euclid area was partially wired before February 15, 1966, and 2) that petitioner sought and obtained a franchise from the city authorities in Euclid for its CATV operations on March 14, 1966, prior to the date of the letter order here in dispute;

And, further, this court viewing such facts as establishing a showing of irreparable damage occurring to petitioner absent some relief and as establishing a substantial likelihood that in this aspect of this petition petitioner may prevail on the merits of his petition for review;

Now, therefore, in the interest of the preservation of the status quo between the parties as nearly as may be achieved under the complex facts of this situation, this court does hereby vacate its prior denial of injunctive relief entered on July 22, 1966, and hereby grants said petition for interlocutory relief pendente lite, thereby restraining the effectiveness of respondent's order of April 29, 1966, said stay, however, being specifically restricted in its effectiveness to petitioner's operations within said city of Euclid and said stay being contingent upon petitioner's prompt filing and processing of applications for Federal Communications Commission's approval of petitioner's existing or proposed CATV operations in the cities of of Euclid, Mapleheights and Beechwood (and any others it chooses);

And, it is further ordered, that the petition for review of said order of the Federal Communications Commission dated April 29, 1966, be set for reargument on the merits before the same panel of this court in the April 1967 term of said court.

ENTERED BY ORDER OF THE COURT

/s/ Carl W. Reuss
Clerk

[1] Date of the first FCC order regulating CATV.

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BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,367

BOOTH AMERICAN COMPANY,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM A DECISION
OF THE FEDERAL COMMUNICATIONS COMMISSION

HENRY GELLER,
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STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on September 22, 1966, are properly set forth in appellant's brief, pp. (i) and (ii).

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TABLE OF AUTHORITIES

* Cases and other authorities chiefly relied upon are marked with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed under Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), by Booth American Company (Booth), from a decision of the Commission, released July 18, 1966 (4 F.C.C. 2d 509), in which the Commission found that appellant's importation into Muskegon and North Muskegon, Michigan, by CATV of the signals of four television stations in Milwaukee, Wisconsin, and one in Chicago, Illinois, was in violation of Section 74.1107 of the Commission's Rules, 47 CFR 74.1107, and ordered Booth to cease and desist from such violation. ~~Venue in this judicial circuit is based on Section 3 of the Judicial Review Act, 5 U.S.C. 1033.~~

Because appellant's statement of the case is argumentative and incomplete, the following counterstatement is submitted to assist the Court.

1. Background

Originally, community antenna television systems (commonly called CATV systems)[1/] came into being to bring television to areas not reached by any television station and to afford multiple services to areas not already having them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions impair or make impossible good television reception. Where such conditions prevail, master antennas have been erected at suitable locations, usually on a mountain or other high elevation where the reception of the signals of the desired stations is strong. The signal is then brought to the community by cable or radio hops, and distributed by cable to the homes of individual customers within the community.[2/] At the home, the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel

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1/ The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such terms shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Sections 74.1101(a), 31 F.R. at 4570, 2 F.C.C. 2d at 801

2/ The distribution cable facilities may be supported on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the municipal government, as are franchises to engage in the business.

capacity, and a twenty channel capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,600. The distances which signals are taken has also greatly increased, to as much as 600 miles. (See Second Report and Order of the Commission, pars. 116, 117, 31 F.R. at 4557-8, 2 F.C.C. 2d at 771-2.)[3/]

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being sought or obtained in the largest cities. (Second Report and Order, par. 117, 31 F.R. at 4558, 2 F.C.C. 2d at 771-2). Because of this growth, the Commission has been concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities, might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV can cause.

To meet the problem, the Commission released the First Report and Order in Docket Nos. 14895 and 15233, on April 23, 1965, 30 F.R. 6038, 38 F.C.C. 683, in which it asserted jurisdiction over CATV systems utilizing microwave radio, and promulgated rules concerning the required carriage of local television stations and the non-duplication of their programs.[4/] And, on the same date, the Commission

3/ The Second Report and Order in Docket Nos. 14895, 15233 and 15971, et al., is the Commission opinion released March 8, 1966 adopting the rules governing CATV operation.

4/ See Carter Mountain Transmission Corp., 32 F.C.C. 459 (1962), affirmed Carter Mountain Transmission Corp. v. Federal Communications Commission, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), cert. den. 375 U.S. 951.

released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 30 F.R. 6078, 1 F.C.C. 2d 453, proposing to assert jurisdiction over all CATV systems, whether or not they use microwave radio to distribute the signals they pick up. Parties who had urged the adoption of rules to govern CATV pointed to the explosive growth of CATV operations and contended that unregulated CATV growth would, by fragmenting the available audience, endanger both local television service and the development of a nationwide "free" television service utilizing the UHF channels to provide multiple services in the major markets.[5/]

The Commission divided the proceeding into two parts. In Part I the Commission announced its tentative conclusion that it has jurisdiction over all CATV systems, whether or not they use radio to carry signals from the receiving antenna, and it proposed to extend the carriage and non-duplication rules it had already adopted for microwave-served CATVs to all CATV systems (30 F.R. at 6082-3, 1 F.C.C. 2d at 463-467).

In Part II (30 F.R. at 6083-7, 1 F.C.C. 2d at 467-477), the Commission initiated a rule making inquiry looking toward possible rule making on further questions posed by the recent trends in CATV

5/ By Public Law No. 529, approved July 10, 1962, 76 Stat. 150, 47 U.S.C. 303(s), Congress, in the so-called all-channel receiver legislation, had authorized the Commission to require all television receivers shipped in interstate commerce, or imported into the United States, to be capable of receiving UHF as well as VHF signals. The major purpose of this legislation was to promote the development of multiple television services nationwide through locally situated UHF outlets. See H. Rept. No. 1559, 87th Cong., 2d Sess., 2-6; S. Rept. No. 1526, 87th Cong., 2d Sess., 2-5.

development, including, inter alia, the effect upon existing and potential independent UHF stations of "the mushrooming entry of CATV into major centers of population . . ." 30 F.R. at 6083, 1 F.C.C. 2d at 468. The Commission stated that it needed further information on the probable impact of CATV in the larger population centers before reaching a decision (30 F.R. at 6084-5, 1 F.C.C. 2d at 470-471). It stated (par. 48, 30 F.R. at 6085, 1 F.C.C. 2d at 471):

> Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.

And, in paragraph 50 of the Notice (30 F.R. at 6085, 1 F.C.C. 2d at 471-472), the Commission specifically invited comments on whether it should adopt a rule prohibiting the extension of the signal of any television station beyond its Grade B contour[6/] into any community

6/ A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 per cent of the locations. See Clarksburg Publishing Co. v. Federal Communications Commission, 96 U.S. App. D.C. 211, at 215-216 n. 12, 225 F.2d 511, at 515-516 n. 12 (1955).

with four or more commercial channel assignments and three or more stations in operation, or a community served by that many stations, "without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community." In order that persons proposing to operate CATV systems could take account of the pending rule making in planning their future actions, the Commission stated (30 F.R. at 6087, 1 F.C.C. 2d at 477):

> . . . we believe it appropriate . . . to put all persons who now operate or propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not.

The Commission announced that in the meantime it would grant microwave radio applications to bring CATV into large market areas only on a showing that independent UHF operations would not be threatened (30 F.R. at 6085, 1 F.C.C. 2d at 471).

On February 15, 1966, the Commission issued a Public Notice (Mimeo No. 79927) in which it announced its agreement on rules to regulate all CATV systems. The Report and Order adopting the rules was to be issued shortly. Included in the Public Notice was an outline of the rules to be adopted, one of which concerned the importation of distant city signals by CATV into the top 100 television markets. The Commission stated, "Parties who obtain state or local franchises to operate CATV systems in the 100 highest ranked television markets . . . which propose to extend the signals of television broadcast stations beyond their Grade B contours, will be

required to obtain FCC approval before CATV service to subscribers may be commenced." The Commission then stated that such requests would be given an evidentiary hearing, and it also stated that, "The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market."

On March 8, 1966, after receipt of voluminous comments, the Commission released its Second Report and Order in Docket No. 15971, et al., in which it adopted new final rules, effective March 17, 1966. (31 F.R. 4540, 2 F.C.C. 2d 725) Upon a comprehensive consideration and discussion of its jurisdiction and the bases of its action, the Commission asserted jurisdiction over all CATVs, made final revised rules requiring the carriage of local television stations and non-duplication of their signals, adopted a new rule to limit the impact of CATV operations in the major markets, and announced that there were certain areas of concern which would be dealt with on an ad hoc basis.

The Commission noted that Congress, in the 1962 all-channel receiver legislation, had made the judgment that the widest possible development of UHF is the best way of achieving an adequate national television service, including both commercial and educational systems, 31 F.R. at 4557, 2 F.C.C. 2d at 770. It believed that since UHF development was already proceeding in at least 163 communities or areas - most of which were located within the top 100 television markets - any halt or curtailment of the growth of UHF development

caused by the distribution of signals from other areas in these communities by CATV would be particularly significant.

The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the original station into the Grade A service area of any station in a community in one of the largest one hundred television markets. 7/ In order to avoid disruption of existing service, the Commission permitted systems in operation on February 15, 1966, the date on which it had given public notice that new rules would soon be adopted, to continue their existing operations. As to these existing systems, however, the Commission went on to state that, " . . . we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing)." (31 F.R. at 4563, 2 F.C.C. 2d at 785).

Section 74.1107 of the Rules was adopted to effectuate these determinations. The parts of that rule pertinent to this proceeding can be summarized as follows. Subsection (a) contains the general standard that no CATV shall extend the signal of any television station beyond its Grade B service area into the Grade A service area of another station located in one of the top 100 television markets

7/ See footnote 6, supra, for the definition of Grade A and Grade B contours.

until such extension is shown to be consistent with the public interest in an evidentiary hearing before the Commission. Subsection (d) exempts CATV systems which had commenced service by February 15, 1966, from the above requirement. This "grandfather" clause is limited by the provision that such an exempted CATV system can not extend its service into new geographical areas within the market if, upon petition filed by a local television station, it is found that such extension is contrary to the public interest.

2. The Present Proceeding

On May 13, 1966, the Commission issued an Order to Show Cause, 3 F.C.C. 2d 713 (R. 8-12), 8/ directing Booth to show cause why a cease and desist order should not be issued against further operation of Booth's CATV systems in Muskegon and North Muskegon to the extent that Booth was bringing into those communities, within the Grade A contour of Station WZZM-TV, Grand Rapids, Michigan, the signals of stations WTMJ-TV, WITI-TV, WMVS and WISN-TV, all in Milwaukee, WMAQ-TV, Chicago, and WWTV, Cadillac, Michigan, all beyond their Grade B contours. Finding that expeditious action was necessary the Commission directed that immediately after the record was closed it was to be certified to the Commission for final decision, and that within seven days of the date on which the record was closed the parties were to file their proposed findings of fact and conclusions of law.

8/ By a telegram sent April 20, 1966, the Commission had requested information concerning Booth's operations, and inquired whether Booth would voluntarily cease any violations of the rules (R. 1-3). Booth responded on April 28, 1966, stating that until judicial approval of the rule, it would not comply (R. 4-7).

A prehearing conference was held on June 6, 1966, and an evidentiary hearing was held on June 16 and 17, 1966. The evidence adduced showed that the following events occurred prior to February 15, 1966. Booth received franchises to operate CATV systems in North Muskegon and Muskegon on August 23 and September 7, 1965, respectively (R. 94). A contract was signed with the General Telephone Company of Michigan on August 25, 1965, to construct the needed cable facilities (R. 25-26). The installation of trunk and distribution cable by the telephone company was completed by January 15, 1966, in North Muskegon, and construction in Muskegon began on January 3, 1966 (R. 26-27). A request for FAA approval of the proposed tower was made on November 29, 1965 (R. 26). Head end equipment was installed and ready by February 1, 1966 (R. 26). In monetary terms this represented an actual expenditure of $91,549.61, additional obligations in the amount of $127,050, and a five year contract for the lease of the cable from the telephone company totalling $1,547,520 (R. 81-83). This comes to a total of $1,766,119.61 expended or committed subsequent to the notice of proposed rule making and prior to February 15, 1966.[9/]

In a decision released July 18, 1966, 4 F.C.C. 2d 509 (R. 203-218), the Commission found that both Booth systems had commenced operation after February 15, 1966 in Muskegon and North Muskegon. (March 4 in North Muskegon and April 15 in Muskegon), and that they were importing the signals of the four Milwaukee stations in violation of Section 74.1107(a) of the Rules, since Muskegon and North

9/ $31,518.39 was spent subsequent to February 15, 1966, but this was for CATV operational expense (R. 82).

Muskegon are in the Grand Rapids - Kalamazoo television market, which is the 38th largest in the country, and the CATV systems are within the Grade A contour of WZZM-TV, Grand Rapids. Booth was ordered to cease and desist from carrying the above stations into Muskegon and North Muskegon. Carriage on the CATV of WZZM-TV (Grand Rapids), WOOD-TV (Grand Rapids), and WKZO-TV (Kalamazoo) was found to be consistent with the rule since these stations all put a Grade B or better signal into Muskegon and North Muskegon. The Grade B contour of the Cadillac station was also found to penetrate the area.

The Commission considered the equities pleaded by Booth, including the costs incurred prior to February 15, 1966, and the commencement of service after February 15. In finding these equities not persuasive the Commission stated: (4 F.C.C. 2d at 514, N.209-210):

> 13. In any event we find no equities in favor of Booth which merit special consideration. Since April 23, 1965, when we released our notice of inquiry and notice of proposed rulemaking in Docket No. 15971 (1 F.C.C. 2d 453), Booth has been on notice that the Commission had under consideration the assertion of jurisdiction over nonmicrowave, as well as microwave, CATV systems and the imposition of restrictions upon the distance that television signals could lawfully be extended by such cable systems. In fact, the Commission had before it a more far-reaching proposal than that which was finally adopted. Booth concedes that it was aware of the contents of this notice, but it nevertheless proceeded with its plans to construct and operate the CATV systems here in question. (See memorandum opinion and order in dockets Nos. 14895, 15233, and 15971, supra, 3 F.C.C. 2d at 823-826.) According to the evidence submitted by Booth, the bulk of its expenditures and its principal contractual obligations in connection with the construction of the North Muskegon and Muskegon cable systems were incurred prior

no reason why it should not

to February 15, 1966, and with respect to such expenditures it is in the same position as any other CATV owner who was proceeding with his plans and construction as of February 15, 1966. Certainly, these commitments were not made in reliance upon any notice issued by the Commission. Insofar as the February 15, 1966, public notice is concerned, the announcement was intended to emphasize the all-inclusive application of the proposed rule, i.e., to each and every CATV system operating within the grade A contour of each and every television station located in 1 of the 100 highest ranked television markets. Although respondent could hardly have failed to realize that this was a possible, if not probable, construction to be placed on the words used in the notice, it nevertheless made no effort to ascertain from either the Commission or from the experienced communications counsel by which it was then represented whether it could legally proceed with its plans to carry the distant stations before obtaining Commission approval. Furthermore, the respondent has continued to expand its system after the rule itself was adopted, at which time it could no longer rely upon any ambiguity or mistake in the notice. It has done so without coming to the Commission until June 10, 1966, with any request for a waiver based upon a claim of misunderstanding or being misled by the Commission. Finally, respondent was not required under the rules to cease all operations but only to remove, on and after March 17, 1966, those signals which come within the interdiction of section 74.1107. (Emphasis added.)

In its decision, the Commission also considered and rejected contentions going to its jurisdiction, the validity of the expedited

procedure and the adequacy of the notice of the new rules.[10/] It denied a request for oral argument on the ground that no further clarification of fact or law was necessary. The Commission stayed the effective date of its own order pending the Court's disposition of a stay motion filed by appellant. On September 16, 1966, the Court granted that stay motion pending final disposition of the appeal. Pursuant to the Commission's petition for rehearing, the Court, on October 3, 1966, modified and interpreted its stay order to mean that appellant is limited to adding subscribers to its existing distribution lines as of October 3.

10/ During the hearing, Booth introduced, over the objections of the Broadcast Bureau, certain evidence as to Booth's past record as a broadcast licensee; its expenditures and commitments in connection with the CATV systems; its obligations to the people of Muskegon and their need for the service; and the situation with respect to present and future UHF prospects in the area. Although Booth conceded that the Commission was not bound in the present proceeding to consider the merits of a Petition for Waiver which had been filed by Booth on June 10, 1966, consisting of much of the same evidence introduced at the hearing, it urged that the Commission was required to consider this evidence in order to determine whether a cease and desist order should be withheld until the waiver request was acted on. The Commission rejected this argument (4 F.C.C. 2d at 514-517, R. 211-213).

SUMMARY OF ARGUMENT

I.

The Commission's decision that Booth's alleged reliance on the Public Notice of February 15, 1966 did not warrant an exemption from Section 74.1107 of the Rules was a reasonable exercise of its discretion. The substance of this rule was announced in a public notice on February 15, 1966, and the text of the rule was released on March 8, 1966. Booth commenced CATV service in North Muskegon on March 4, 1966, and in Muskegon on April 15, 1966. Booth's allegation that the characterization of the rule in the public notice led it to believe that its service would be legal is not convincing because virtually all of Booth's expenditures and commitments were made prior to the issuance of the public notice. This was done in full knowledge that the Commission had an outstanding rule making proceeding which proposed to cover this type of situation. Furthermore, Booth refused to comply with the rules after their release and, in fact, continued to expand its North Muskegon system and even started a new system in Muskegon. Thus, even if the public notice mischaracterized the rule, the Commission could properly find that Booth did not rely on the public notice to its detriment and accordingly was not entitled to the special relief it sought.

Aside from this, it is clear that Booth's commencement of service in the separate community of Muskegon on April 15, 1966, long after the text of the rules was released, was a flagrant

violation of Section 74.1107 and was unrelated in any way to the February 15 Notice. Booth's claim that its Muskegon system should be permitted under Section 74.1107(d) because it was merely an extension of an existing service into a "new geographical area" is not persuasive. The record shows that Booth was indifferent to the rules and, in fact, commenced service in the face of admitted doubts as to the legality of its action. The Commission reasonably interprets Section 74.1107 as requiring approval wherever service is proposed for a new community. The expansion allowed in subsection (d) is only within the same political community where service already exists.

II.

It is well settled that the Commission has wide discretion to control the scope of its proceedings and to establish priorities as to the manner in which its business is conducted, Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). The Commission here has made a policy judgment in connection with its adoption of rules applicable to CATV systems that compliance with the rules must be achieved before requests for relief can be considered. Such a course was dictated by requirements of orderly procedure, out of fairness to those systems which voluntarily complied with the rules while requests for legitimation were pending, and in order to avoid the extensive disruption which might result if the Commission decided ultimately that the service had to be curtailed in the public interest. The Commission considered

whether a departure from this policy was warranted in this case and decided that it was not. The CATV rules nonetheless provide a mechanism wherein Booth can seek Commission approval for its proposal in a further proceeding.

For these reasons there is no merit to Booth's argument that the Commission restricted the scope of the cease and desist proceedings in a manner contrary to this Court's decision in C. J. Community Services v. Federal Communications Commission, 100 U.S. App. D.C. 379, 246 F.2d 660 (1957). The holding of that case is that the Commission must exercise its discretion under the public interest standard of the Communications Act before issuing a cease and desist order. But here the Commission has exercised that discretion and has determined that the public interest would be adversely affected by the establishment and expansion of Booth's CATV system before a hearing could be held to determine whether the service offered should be permitted.

III.

Finally, the Commission's decision to dispense with an intermediate decision was not an unreasonable exercise of statutory discretion. Section 409(a) of the Communications Act permits the Commission to do this upon a finding that such a course is imperative. The Commission has determined that the character of the problem of continued CATV expansion is such that time is of the essence and therefore an expedited procedure was necessary.

ARGUMENT

I. THE COMMISSION EXERCISED ITS DISCRETION IN A REASONABLE MANNER WHEN IT HELD THAT BOOTH'S ASSERTED RELIANCE ON THE PUBLIC NOTICE OF FEBRUARY 15, 1966 DID NOT WARRANT AN EXEMPTION FROM SECTION 74.1107.

Section 74.1107 provides that CATV systems located within the Grade A contour of a television station in the top 100 markets may not, without the approval of the Commission, carry the signal of any television station where the effect is to extend the signal beyond that station's Grade B contour. The rule contains an exemption for service which was begun prior to February 15, 1966. The rule became effective with its publication in the Federal Register on March 17, 1966. Having begun its operation subsequent to February 15, 1966, Booth is not an exempted system, and since March 17, therefore, its operation has been in violation of the rule.

A. Booth's CATV System Was Completed Prior To The Issuance Of The Public Notice Of February 15, 1966, And Was Planned With Full Knowledge That The Commission Proposed To Regulate CATV Systems.

Throughout its brief Booth argues that it should be the recipient of special consideration because it had been misled by the Commission's Public Notice of February 15, 1966 into commencing its operation.[11/] This notice constituted a preliminary announcement of a broad plan for the regulation of CATVs which the Commission had that day agreed upon. Booth contends in essence that enforcement of

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11/ The February 15, 1966 Public Notice which announced the top 100 market rule stated:

> The hearing requirement will apply to all CATV operations proposed to communities lying within the predicted Grade A service contour of all existing television stations in that market.

(cont'd)

the rule under the circumstances of this case would be inconsistent with ordinary concepts of fair play.

Contrary to the impression created by appellant's brief, the Commission carefully considered the equities advanced by Booth and decided that they did not warrant special relief (R. 208-210). We believe that the Commission's action was a reasonable one since the record clearly shows that Booth took no action to its detriment in reliance on the public notice and, further, that when Booth realized the legality of its operation was doubtful, it acted in flagrant disregard of the rules by adding new subscribers in North Muskegon, where its operation had commenced, and by starting a new system in the neighboring community of Muskegon as well.

Assuming that Booth could have been misled by language in the February 15, 1966 Public Notice into believing that the Commission's rules would not apply to its contemplated North Muskegon system, it is difficult to understand why this one fact should assume the critical significance that Booth assigns to it. Long before the Public Notice was issued, Booth was on notice that the Commission was actively considering the adoption of a distant signal rule (supra,

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11/ (cont'd) Since only one of the three television stations in the Grand Rapids-Kalamazoo market places a Grade A signal over Muskegon and/or North Muskegon, Booth asserts that it concluded the new rule would not apply to it (Br. 18). It was not until March 8, 1966, when the text of Section 74.1107 was released that Booth alleges that it learned that the rule requires a hearing where a distant signal is to be imported into the Grade A service area of any station in one of the top 100 markets.

pp. 5, 6). For on April 23, 1965, in its Notice of Rule Making and Notice of Inquiry, the Commission had stated, after describing the nature of the regulations under consideration:

> . . . we believe it appropriate . . . to put all persons who now operate or propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. (30 F.R. at 6087, 1 F.C.C. 2d at 477.)

Booth was mindful of this notice when during the summer of 1965 it began work on its systems.

More significantly, the February 15 notice occasioned no change in Booth's activities. As detailed in our counterstatement (p. 10, supra), Booth had laid the groundwork for its CATV systems long before February 15, 1966, and work on those systems had proceeded apace. Almost all of the money to be spent in building the systems had been expended or committed before February 15, 1966, and in fact the systems were virtually completed by that time.

Thus, the record conclusively supports the finding that Booth's financial commitments and contractual obligations were not made in reliance on the February 15 notice and were wholly unrelated to it. In this respect, as the Commission stated, Booth was "in the same position as any other CATV owner who was proceeding with his plans and construction as of February 15" (R. 210). Since Booth did not act to its detriment on the basis of the notice, its claims that the Commission should be estopped from enforcing the rule and that special equities were created in its favor are wholly without merit.

Nor is there substance to the argument that because Booth's operation was legal when it began, it must be allowed to continue. In essence, this is simply a contention that the "grandfathering" exemption set forth in Section 74.1107(d) should apply to all systems in operation when the rule became effective rather than only to those operating as of February 15, 1966. This question was carefully considered by the Commission in connection with the rule making and "sound reasons militating against such a course" were found to exist. Stating that CATV growth had been "explosive," a finding amply documented from a nationwide standpoint and well-exemplified by appellant's own systems, the Commission concluded that "even a postponement of several weeks might have irrevocably changed the existing situation to a substantial degree."[12/]

Booth's argument that applying the rule to its own situation represents "entrapment" because of the February 15 notice is also without foundation. The rules do not purport to make illegal any CATV operation engaged in prior to that date and the Commission's order here under review seeks to impose no sanction for such actions. The conduct which the Commission seeks to enjoin is that which occurred subsequent to March 17, 1966 when the provisions of the new rules were known to all and had become effective.

12/ Memorandum Opinion and Order of May 25, 1966, 3 F.C.C. 2d 816, 821. The importance attached by the Commission to prompt action in this area is discussed further in Points II and III, infra.

At that time Booth not only refused to bring its operation into compliance but even refused to maintain the status quo or seek an immediate ruling from the Commission. It proceeded, instead, to double the number of its subscribers in North Muskegon and then to expand into the larger neighboring city of Muskegon. Indeed, when Booth was informed that its systems might be operating in violation of the rules, it responded that it had no intention of complying until the validity of the rules was determined "by a court of appropriate jurisdiction" (R. 6), and at the hearing Mr. Edward Clark, vice-president of Booth, testified that Booth was unwilling to commit itself to obey any cease and desist order which the Commission might issue (Tr. 331). And it continued to add subscribers in both Muskegon and North Muskegon pending judicial review.[13/]

In sum, while the language of the Public Notice provides a basis for Booth's asserted belief (as of February 15, 1966) that the rules would not apply to its North Muskegon system, this belief was dissipated on March 8 when the text of the rules was released. At this time it would appear that Booth had wired up less than one hundred households. Taking into account its subsequent conduct and the fact that the systems were substantially completed prior to the issuance of the Notice it is difficult to escape the conclusion that not only had Booth planned and arranged the construction of its CATV systems with the hope that they would be in operation before the

13/ See this Court's order entered October 3, 1966.

Commission promulgated any rules, but that when the Commission's rules were issued, Booth proceeded anyhow because it had already expended or committed large sums of money and construction of the systems was nearly completed. In any event, we think it clear that on the record as a whole the Commission could properly find that a cease and desist order should issue notwithstanding the "special equities" arising from the Public Notice which Booth asserted. 14/

14/ Booth also appears to contend (Br. 24) that even if the Commission has the substantive power to apply its "changed" rule in this case, there was no compliance with Section 4 of the Administrative Procedure Act, 5 U.S.C. §1003, in that there was no further rule making proceeding or ad hoc hearing in which Booth could be heard. Specifically, Booth alleges that the advance notice requirement of Section 4(a) was violated by the Commission when it changed the distant signal rule between the February 15 Public Notice and the March 8 Second Report and Order without any advance notice or even any contemporaneous explanation.

This argument is without merit. In the Notice of Proposed Rulemaking and Notice of Inquiry, the Commission discussed at length a possible distant signal rule in the context of "the subject and issues involved" as required by Section 4(a) (30 F.R. at 6085, 1 F.C.C. 2d at 471-472). Such a rule was then adopted in the Second Report and Order (§74.1107). Nothing more is required. The February 15 Public Notice was, as this Court has stated, simply a notification "of the shape of the forthcoming regulations" (p. 2, order of September 16, 1966). The rules were not changed between February 15 and March 8 because there were no rules to change until the Second Report and Order was released on March 8. It is true that the Public Notice endeavored to capsulize the substance of the yet-to-be adopted rules, and in doing so misstated the scope of §74.1107. But this in no way can be called a change in the rules necessitating further proceedings. The Commission did not explain the "change" because there was none. The fact that the Public Notice's characterization of §74.1107 appeared different than the actual rule was an unintentional and, we submit, harmless error.

B. Appellant's Commencement of Service In Muskegon On April 15, 1966, Was a Clear Violation Of §74.1107(a), Independent Of The Issue As To North Muskegon.

A distinction must be drawn between the communities of North Muskegon, in which Booth commenced service on March 4, 1966, and Muskegon, in which Booth commenced service on April 15, 1966. If the North Muskegon operation is illegal, as we allege, the Muskegon operation falls with it. However, even if the North Muskegon operation is held to be legal on the ground that Booth was prejudicially misled, this consideration would have no applicability to the Muskegon operation. Service was not commenced in Muskegon until more than a month after the Commission's rules had been released so that Booth's justification for instituting service in North Muskegon has no relevance to Muskegon.

The Commission interprets its rules as requiring a hearing before any CATV may commence operation in any community where it is not "grandfathered" upon the basis of operation prior to February 15th. Since North Muskegon and Muskegon are incorporated municipalities with legally defined boundaries, each municipality is a separate community under Section 74.1107(a) (R. 208). Accordingly, even assuming that appellant had good cause for commencing service in North Muskegon on March 4, 1966, it was in direct violation of Section 74.1107(a) when it commenced service in the separate community of Muskegon on April 15, 1966.

Appellant claims that Section 74.1107(d) of the Commission's rules is unclear, and that the Commission's decision interpreting that rule as limited to expansion to a new geographical area within the same community (Telerama, Inc., 3 F.C.C. 2d 585 (1966)) was not issued until April 29, 1966, some fourteen days after appellant commenced service in Muskegon. Accordingly, appellant asserts that the central issue again involves its good faith in interpreting the rule and the Commission's refusal to consider its good faith in the cease and desist hearing.

The record demonstrates, however, that appellant was in fact indifferent to the requirements of the rules insofar as operation in the city of Muskegon was concerned. Assuming that appellant fully believed that it could commence operation legally in North Muskegon, the record is clear that appellant was fully aware that there was a problem connected with going into Muskegon, and that it did so without consulting either the Commission or counsel (Tr. 322-27).[15] As the appellant's witness made clear, "We just kept on going," despite the confusion in his mind as tc the applicability of the rules to Muskegon.

(2b)

15/ Further evidence of Booth's disregard of the rules is shown by its noncompliance with §74.1105 which requires notice to be given by a CATV operator when he begins operating in an "obviously new geographic area." Booth did not comply with this requirement despite the fact that the Second Report and Order gives, as an example of "patently new geographical areas," the illustration of the "extension of a system from a suburb into the main community." (31 F.R. at 4564, 2 F.C.C. 2d at 786). This is quite clearly the situation in Muskegon.

Therefore, insofar as the city of Muskegon is concerned there can be no question but that appellant was in the same position as any other party who may have made extensive plans and expended money, but had not commenced operation prior to the time the Commission's rules came out. Accordingly, the Commission was justified in refusing to give any weight to appellant's argument that it had special equities with respect to the Muskegon operation (R. 208-209).

Appellant also argues that Section 74.1107(d) permits expansion into a "new geographical area" absent a complaint, and that since its Muskegon system is merely an extension into a "new geographical area" from North Muskegon, it is not in violation of Section 74.1107(a). This construction, however, would destroy the basic purpose and thrust of the section. Under it a system in one small suburb which was "grandfathered" as of February 15, 1966, could then, if it used the same head-end, construct new systems in all of the other suburbs and the main community (necessitating new and separate franchises) without coming within the terms of subsection (a). Such a result is surely unreasonable. In our view the purpose of the rule, the language of the Second Report and Order explaining Sections 74.1107(a) and (d), and the text of the remainder of Section 74.1107, make clear that it was intended to be applied in the context of identifiable communities which are independent municipalities. And, as stated above, this is the construction given by the Commission.

Aside from this, however, the real question is whether or not Booth was justified in establishing a system in Muskegon in the face of the rule. If a question existed as to its scope, a declaratory ruling could have been requested. Instead, as indicated above, Booth simply determined to go ahead. Under the circumstances there is no basis whatever for the assertion that it was entitled to special consideration by the Commission. On the contrary, we submit that the commencement of service in Muskegon is part of an overall pattern of conduct that reflects an indifference on the part of Booth to the consequences of its actions. Clearly, it is not entitled to relief from this Court.

II. THE COMMISSION'S DECISION TO OBTAIN COMPLIANCE WITH THE RULE BEFORE CONSIDERING A REQUEST THAT THE OPERATION BE MADE LEGITIMATE IS CLEARLY WITHIN THE SCOPE OF ITS DISCRETION.

Appellant presents two arguments which place heavy reliance upon this Court's decision in C. J. Community Services, Inc. v. Federal Communications Commission, 100 U.S. App. D.C. 379, 246 F.2d 660 (1957). They are: (1) that the Commission erred in failing to consider whether any extenuating circumstances favored the continuation of appellant's CATV service notwithstanding appellant's violation of the Commission's rules (Br. pp. 33-40); and (2) that the Commission improperly refused to consider appellant's request for temporary operating authority prior to the issuance of the Commission's cease and desist order (Br. pp. 29-33). We believe that each of these claims is without merit and that appellant's reliance upon this Court's opinion in C. J. Community is misplaced. Since this is appellant's sole authority, we discuss the case in some detail.

In C. J. Community, a non-profit corporation installed a "booster" facility to bring television service to the small mountain town of Bridgeport in the State of Washington. The town was so situated that no usable television signal, coming directly from any licensed television station, was available to the town's inhabitants. Thus, the booster provided a first service to the community of Bridgeport and an important means of receiving news and information, entertainment and education (100 U.S. App. D.C. at 380, 246 F.2d at 661).

Acting pursuant to Section 312 of the Communications Act, 47 U.S.C. 312, the Commission ordered the appellant to cease and desist from the booster operation because the appellant was operating without a license. However, the Commission's rules then outstanding did not provide for the licensed operation of such installations. While a rule making proceeding had been instituted to examine the problem, it was still pending at the time of the Commission's order. Thus, the Commission argued that the only alternative to a licensed operation (which was not then possible under the rules) was "'not unlicensed operation, but no operation'" (100 U.S. App. D.C. at 382, 246 F.2d at 663).

Noting that it was "concerned only with the problem before [it]" (100 U.S. App. D.C. at 382, 246 F.2d at 663), this Court reversed the Commission. It ruled that the Commission was not compelled to issue a cease and desist order for every violation of the Communications Act. The language of Section 312 states that a cease and desist order "shall" be issued only if it be decided that the order "should issue" (100 U.S. App. D. C. 383, 246 F.2d at 664). Accordingly, this Court held (100 U.S. App. D.C. at 383, 246 F.2d at 664):

> We will not determine that the agency rule-making action has been unreasonably delayed or that its instant action was arbitrary. We say only that, short of the appellant's statutory right, the Commission acted mistakenly in its belief that it lacked discretion to withhold the issuance of a cease and desist order, and upon this point the Commission's order must be reversed.

In remanding the case to the Commission so that it might exercise its discretion to determine whether the circumstances warranted the issuance of a cease and desist order, this Court also observed, "that it is manifestly inequitable that the appellant be subject to a cease and desist order when the Commission has failed to provide an administrative mechanism through which a license may be procured" (100 U.S. App. D.C. at 383, 246 F.2d at 664). Thus, this Court suggested that the Commission consider a request by appellant for temporary authorization pending completion of the rule making proceeding (100 U.S. App. D.C. at 383-384, 246 F.2d at 664-665).

Relying upon C. J. Community, appellant argues that the Commission failed to exercise its discretion here by refusing to consider whether it should withhold issuing a cease and desist order. Specifically, appellant points to the Commission's rejection of evidence that appellant offered to justify its conduct (R. 211), (Br. pp. 34-36).

The Commission, however, carefully considered whether appellant had been prejudicially misled by the February 15, 1966 Public Notice. As discussed in the preceding section of our brief, the Commission concluded that Booth had planned and constructed its system prior to February 15 and had continued to expand its operation after the rule was adopted, at a time when it could no longer rely upon any ambiguity or mistake in the Notice. Nowhere in its brief

does appellant allude to the Commission's consideration of its claim of special equities. In our view this omission is not without reason for the Commission's discussion shows that it did exercise its discretion, albeit in a manner adverse to appellant. This is all that is required by the C. J. Community case.

Following its determination that appellant had no special equities which justified withholding the cease and desist order, the Commission turned to a consideration of the additional evidence appellant had offered. This evidence included information concerning: (1) the past record of performance of appellant as a licensee of the Commission; (2) its expenditures and commitments in connection with construction and operation of the CATV systems; (3) its commitments to the people of North Muskegon and Muskegon, and the need for CATV service; and (4) the situation with respect to present and prospective UHF operations in the area (R. 211). Significantly, this evidence was similar to the data appellant was offering to justify a waiver of the rules (R. 211), and related to permanent as well as temporary relief.

In the rule making proceeding the Commission had considered the question of whether it should permit CATV systems to commence operation prior to the outcome of evidentiary hearings. It had stated: "The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV - to whether it will achieve very substantial penetration in the major

markets and, correspondingly, to what its impact will be upon UHF developments in these markets" (31 F.R. at 4558-4559, 2 F.C.C. 2d at 773), and concluded (31 F.R. at 4560, 2 F.C.C. at 776):

> To summarize, we have reached no final conclusion in this area -- i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and most effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

In its decision here, the Commission reaffirmed this policy determination "that the public interest would be affected adversely by the favorable exercise of discretion which would permit carriage of distant signals before all relevant facts in the particular case have been ascertained," and its conclusion that "on balance, the likelihood of adverse consequences from the proscribed CATV operations outweighed the possible benefits of immediate CATV service" (R. 212).

It found "no sufficient basis in any of the arguments advanced on behalf of Booth to depart in this case from the policy determinations enunciated in the rule making proceeding" (R. 212). Accordingly, it rejected, as irrelevant, appellant's additional submission.

We believe the Commission's determination to exclude the additional evidence in mitigation offered by appellant was clearly correct. As this Court has said in an analogous situation, "The Commission having considered and decided the * * * issue in the rule making proceedings should not be required to cover again the same ground." Transcontinent Television Corp. v. Federal Communications Commission, 113 U.S. App. D.C. 384, 388, 308 F.2d 339, 343 (1962); see also, National Broadcasting Co., Inc. v. Federal Communications Commission, __ U.S. App. D.C. __, 362 F.2d 946 (1966); The Goodwill Stations, Inc. v. Federal Communications Commission, 117 U.S. App. D.C. 64, 325 F.2d 637 (1963). Having found that it was not in the public interest to permit the carriage of distant signals by cable systems operating in one of the top 100 television markets prior to the resolution of the questions presented by such operation in an evidentiary hearing, the Commission was not bound to reconsider its finding in a cease and desist proceeding where similar evidence would be presented "although addressed now to a specific * * * application rather than to the general problem." National Broadcasting Co., Inc. v. Federal Communications Commission, supra, 362 F.2d at 954. A contrary result would effectively undermine

the rule making process as it would require a constant reappraisal, on a case-by-case basis of the findings made in the rule making proceeding before a cease and desist order could issue.

Appellant's second contention is that the Commission refused to consider its request for temporary operating authority prior to issuing the cease and desist order (Br. pp. 27-33). In this respect it relies upon this Court's suggestion to the Commission in C. J. Community that under the circumstances there presented the Commission should consider a temporary authorization.

In C. J. Community, however, the rule making proceeding was incomplete at the time the Commission issued its cease and desist order forcing the appellant there into the position of having an unlicensed operation or no operation at all. Here the rule making proceeding with respect to CATV has been concluded. It has resulted in the assertion of jurisdiction over all CATVs, the adoption of final revised rules requiring the carriage of local television stations and nonduplication of their signals, the adoption of a new rule providing for hearing procedures to explore the impact of CATV operations in the major markets and the announcement that there were certain areas of concern which would be dealt with on an ad hoc basis. These new rules provide an administrative mechanism, i.e., either an evidentiary hearing or a petition for waiver, through which the appellant may obtain approval for its operation. Thus, the appellant here is not forced, as the appellant was in C. J. Community,

into the position of having an unapproved operation or no operation. 16/

Furthermore, the Commission made clear in its decision in Buckeye Cablevision, Inc., 3 F.C.C. 2d 808, released May 27, 1966, that a waiver request would not be acted upon while a CATV system was operating in violation of the rules. The Commission stated (3 F.C.C. 2d at 811):

> We think that the request for waiver must be denied. In the first place, we would not grant a waiver of section 74.1107 while a system was operating in violation of that section. Ordinarily, we would not even consider the merits of a request for waiver until the violation had ceased. To condone such a procedure would undercut the very premise of section 74.1107, that the public interest requires Commission consideration of new distant signal operations in major markets before they are commenced, and would encourage other persons to violate the rule while seeking relief before the Commission. Moreover, it would be manifestly unfair to persons who have sought a waiver or evidentiary hearing while deferring distant signal operations in compliance with the rule. Further, there would be an unfair delay in processing such petitions for waiver by those in compliance with the rule. Accordingly, we shall follow a course of promptly considering petitions for waiver by persons who are deferring distant signal operations in compliance with the rule and of not considering requests

16/ In his concurring opinion in C. J. Community, Judge Washington reflected this Court's concern with the inequitable posture in which that case was presented commenting: "The present situation is a harsh one. The Commission might well have been better advised to ignore the existence of booster stations such as this until the time when it is prepared to deal with them on some basis more equitable than mere repression" (100 U.S. App. D.C. at 384, 246 F.2d at 665). The point here is that the Commission has devised a scheme for the approval of CATV operations and is not merely trying to repress them.

> for waiver by persons operating in violation of section 74.1107 until the violation has ceased. 17/

It is well settled that the Commission has wide discretion to control the scope of its proceedings and to establish the priorities as to the manner in which its business will be conducted. Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134 (1940); Federal Communications Commission v. Taft B. Schreiber, 381 U.S. 279 (1965). Here the Commission has made a policy judgment, applicable not only to Booth but to all other systems, that compliance with the rules must be obtained before requests for legitimation are entertained. The consideration underlying this judgment are manifestly reasonable. As set forth in the passages quoted above, the Commission found that such a course was dictated by requirements of orderly procedure, fairness to those systems which comply with the rules, and out of consideration for potential subscribers whose service would be substantially disrupted if it was ultimately found that the importation of distant signals was contrary to the public interest. Clearly, the Commission's judgment involves no abuse of discretion.

In sum, the situation here is, as the Commission found, totally dissimilar from that presented in C. J. Community.

17/ Appellant argues that Buckeye Cablevision, Inc., 3 F.C.C. 2d 808 (1966), is distinguishable because appellant's operation was commenced before the policy announced there was adopted. What appellant refuses to recognize is that the Commission reviewed appellant's claim that it was entitled to special equities and rejected the argument that it had been prejudicially misled by the February 15 notice (R. 209-210). Thus, in the Commission's view it was entitled to no more consideration than any other CATV system that had expended substantial sums but had not commenced operation prior to February 15th.

For the decision here to order appellant to cease and desist was not based upon any belief that the Commission lacked discretion to permit continued operation in violation of the rule, but rather upon its view that the public interest would be adversely affected by permitting establishment and expansion of a CATV service before a hearing could be held to determine the impact of CATV in the area. This determination, we submit, was reasonable and clearly within the scope of the Commission's discretion.

III. THE COMMISSION'S DETERMINATION TO DISPENSE WITH AN INTERMEDIATE DECISION WAS A REASONABLE EXERCISE OF THE DISCRETION PERMITTED BY STATUTE.

Appellant argues that by omitting an examiner's initial decision the Commission deprived it of the "full and fair hearing" it is entitled to by law (Br. pp. 40-43). However, Section 409(a) of the Communications Act, 47 U.S.C. 409(a), expressly provides that the Commission may dispense with an intermediate decision upon a finding that "due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision." The Commission made such a finding in this case (R. 10).

In each of the cease and and desist proceedings instituted by the Commission which involved a violation of Section 74.1107, the hearing order provided that once the record was closed, the case should be certified to the Commission immediately for final decision. See e.g. Buckeye Cablevision, Inc., 3 F.C.C. 2d 798, 801-803. The reason for this is to avoid or minimize the likelihood that systems operating in violation of the rule would become "established or well entrenched" during the time it takes for an adjudicatory proceeding to run its normal course. Once entrenched, the Commission found, "it is difficult if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest."[18/]

18/ Second Report and Order, 2 F.C.C. 2d 782.

The course of conduct followed by Booth in this proceeding exemplifies the problem. As the Commission found, the appellant's North Muskegon system had grown from 124 subscribers on March 17, 1966 to 250 subscribers on May 26, 1966 and appellant had commenced a new service in Muskegon as well. In addition, more than 700 applications for service had been accepted by that date and the expansion continued uncontrolled until this Court made clear that its stay of the Commission's order was not intended to permit the addition of new distribution lines. 19/

Booth's conduct since last March leaves little room for doubt that it would use whatever time elapsed during the cease and desist hearing to enlarge the scope of its system, thus presenting the Commission with a situation wherein the disruption flowing from enforcement of its order would be of such a magnitude as to make it well nigh impracticable. In such circumstances, Booth's claim that it has been denied "due process" has a hollow ring. We think it clear that cases of this kind are precisely what Congress had in mind when it gave the Commission discretion to act without an examiner's decision.

CONCLUSION

For the foregoing reasons the Commission's action should be affirmed.

19/ See this Court's order entered October 3, 1966.

Respectfully submitted,

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November 10, 1966

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